Doctrinal Study of the Evolution of Universal Jurisdiction and Ways of Strengthening it in the Near Future: Prospects and Challenges

A Thesis submitted for the Degree of Doctor of Philosophy

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Abstract

This thesis analyses how far the concept of universal jurisdiction (UJ) has evolved and explores what should be done to enhance it further in the near future. Thus, the research has sought to discuss the most important points related to where this doctrine stands today. This includes, the definition of UJ, the scope of this jurisdiction and the preconditions for UJ that are required in accordance with states' practice. The study shows that UJ is not absolute over international crimes. Rather, there are a number of conditions that must be met to exercise UJ. These include the presence of the accused in the territory of the state that will exercise UJ. This is because there is no legal basis that supports the legality of UJ in absentia. Therefore, neglecting the preconditions for UJ will make it a jurisdiction that can be selectively misused.

In general, it is observed that although UJ is broadly accepted across states, there remains some ambiguity surrounding the exercise of UJ. Accordingly, the research discusses the possibility of exercising UJ under unified international guidance such as a draft article that codify UJ. In this regard, the research assesses the position of states on UJ in order to provide a proposal that summarises the concept and scope of UJ. The research aims to put this proposal in the hands of the International law commission in order to help them draft articles on UJ.

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Table of Abbreviations

AFLA	Africa Legal Aid
AU	African Union
DCCAPSM	Draft Code of Crimes against the Peace and Security of Mankind
EU	European Union
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICYT	International Criminal Tribunal for the former Yugoslavia
ILA	International Law Association
ILC	International Law Commission
NGO	non-governmental organization
PCIJ	Permanent Court of International Justice
UJ	Universal Jurisdiction
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
US	United States

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Chapter One: Introductory Chapter

1.1: Research Background

Universal jurisdiction (UJ) or the universality principle in international law forms distinct grounds for jurisdiction, potentially meaning that a state can exert its domestic jurisdiction internationally for a given crime, in line with broader international interests. This concept does not have an agreed definition, however, in practice, an acceptable definition is a jurisdiction in criminal law that stems from a specific type of criminal activity, notwithstanding the location of that activity, or the victim's nationality, the accused or convicted person's nationality, or other links to the state that asserts jurisdiction. Thus, any state can utilise UJ to address crimes in which both the victim and perpetrator are foreign nationals and the crime does not occur within its territories. This jurisdiction shows a significant departure from historical grounds for jurisdiction as set out in international law, as usually such jurisdiction would need to be based on a connection between the crime and the state applying its jurisdiction, whether this is based on nationality, territory or another factor.[1] Nevertheless, the implementation of UJ over certain international crimes does not mean it has priority over other forms of jurisdiction. Indeed, UJ is not exercised unless the state that has territorial jurisdiction is reluctant in the prosecution of the crimes that commit on their territories, or there is an absence of any states that invoking to exercise extraterritorial jurisdiction.

At the start of the twentieth century, a fundamental shift occurred in perceptions of the state in the 1800s, at which time sovereignty was unquestioned and limited only where they had implicitly or explicitly consented to international laws.[2] The notion of international affairs at that point was not applied to the actions of a government against their own citizens, where, for example, those actions could be perceived as heinous crimes which could be

[1] Charles Chernor Jalloh, Universal criminal jurisdiction, in Report of the International Law Commission on the Work of its 70th Session' [Annexes. A] (2018) UN Doc A/73/10, para 1, at 307.

[2] Rob Cryer, 'International Criminal Law vs State Sovereignty: Another Round?', (2005) 16 European Journal of International Law 979, 988-989; see also Matthew Garrod, 'The Protective Principle of Jurisdiction over War Crimes and the Hollow Concept of Universality', (2012) 12 International Criminal Law Review 763, 808.

internationally prosecuted.[3] The most important practice-based justification for adopting universality is when a territorial state does not prosecute a serious crime. Thus, UJ is a highly significant mechanism for combating impunity and countering the issue of safe havens for criminals. Thus, UJ is a supplementary device for asserting jurisdiction in criminal cases, and as such it is a vital element in criminal justice internationally.[4]

Indeed, UJ as a principle allows states to address and attempt to reduce or eliminate certain criminal actions that are considered to go against the dignity of humans. This principle was first introduced to address acts of piracy.[5] Since then, the scope of the principle has gradually extended, covering crimes including genocidal acts, war crimes and crimes against humanity.[6]

Currently, the principle of UJ faces various challenges, and it leads to serious debate and provokes sensitivities.[7] Based on this, it is suggested here that a deep consideration of this principle is timely, and a discussion of emerging factors and perspectives could contribute to improving the way the principle is implemented in practice, particularly as universality is a developing subject, which merits further study.

It is important to note that UJ principle is distinctive in its character, having been established to combat criminal impunity for heinous crimes. Significantly, following the case of *Pinochet,* developments have taken place to increase the effectiveness of UJ, where the adoption of UJ in the national legislations have been increased.[8] In addition, further actions were taken, such

[3] Louis Henkin, 'That "S" word: sovereignty, and globalization, and human rights, et cetera', (2000) 68 Fordham Law Review 1, 12.

[4] Petra Baumruk, *The Still evolving Principle of Universal Jurisdiction*, (PhD Thesis Charles University in Prague, 2015) 2-3.

[5] Mahmoud Cherif Bassiouni, 'Universal jurisdiction for international crimes: historical perspectives and contemporary practice', (2001)42 Virginia Journal of International Law 81, 108.

[6] Claus Kreb, 'Universal Jurisdiction over International Crimes and the Institute de Droit international', (2006) 4 Journal of International Criminal Justice 561, 576. See also Yana Shy Kraytman, Universal Jurisdiction –Historical Roots and Modern Implications, (2005) 2 Brussels Journal of International Studies, 103.

[7] Gabriel Bottini, 'Universal jurisdiction after the creation of the International Criminal Court', (2004) 36 New York University Journal of International Law and Politics 503, 559; International Law Association, Final Report on the Exercise of Universal Jurisdiction In Respect of Gross Human Rights Offences, prepared by the Committee on International Human Rights Law and Practice, submitted to (London Conference, 2000) 10-19.

[8] R. v. Bow St. Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 1), 3 WLR 1456 (H.L.(E.) 1998); Christine M. Chinkin, United House of Lords: Regina v. Bow Street Stipendiary Magistrate, exparte Pinochet Ugarte (No. 3), 93 AM. J. INT'L L. 703, 704 (1999); R. v. Bow St. Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3), 2 WLR 827 (H.L.(E.) 1999)**;** See also William A. Schabas, *An Introduction to the International Criminal Court*, (2edn, Cambridge University Press, 2004) 20. See chapter four at 4.2.1.1: The adoption of the universal jurisdiction expressly under national legislation.

as the Princeton Principles on UJ (2001),[9] and the resolutions of the Institute of International Law on UJ (2005);[10] although these could arguably have been used more progressively to bring about further change.[11] However, in the current climate, there appears to be political and other pressures that are having a negative effect on the principle. Thus, a basic aim of this research is for the acceptance of UJ to be developed and strengthened, so that it does not decrease in importance and scope in the international justice system.[12]

Currently, although UJ is broadly accepted across states, issues arise when applying the principle, which is significant in terms of the current situation in international relations and international law. This is because the universality principle in international law has led to a number of political and legal issues,[13] including the potential clash between the implementation of UJ and the principle of state sovereignty and diplomatic immunity. Such an instance was seen in the case of the *Arrest Warrant of 11 April 2000,* heard by the International Court of Justice, which considered whether an arrest warrant was valid that had been issued by Belgium for the arrest of Abdoulaye Yerodia, foreign minister for the Congo, based on allegations of crimes against humanity and war crimes.[14]

It is worth emphasising that the issues that arise as a result of implementing UJ have not yet been settled, though they have been discussed widely in scholarly literature.[15] Furthermore, it is important to be aware of the lack of uniform regulations and procedures for exercising UJ. In this regard, the scope and application of UJ has been debated by the UN General Assembly Sixth Committee since 2009.[16] However, wider developments have not happened

[9] The Princeton Principles on Universal Jurisdiction, (2001) 28 Princeton University Program in Law and Public Affairs. [hereinafter, The Princeton Principles on Universal Jurisdiction].

[10] Institute of International Law, Resolution on Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes, Krakow Session - 2005. [hereinafter Institute of International Law Resolution].

[11] Petra Baumruk, (n 4), 2.

[12] Charles Chernor Jalloh, (n 1), para 9, at 310.

[13] Gabriel Bottini, (n 7),556-559. See also Olympia Bekou and Robert Cryer, 'The International Criminal Court and Universal Jurisdiction: A Close Encounter?', (2007) 56 International and Comparative Law Quarterly 49, 56.

[14] Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), International Court of Justice (ICJ), 14 February 2002, Immunity and inviolability of an incumbent Foreign Minister in general (paras. 47-55) p 18-20.

[15] Charles Chernor Jalloh, (n 1), para 12, at 311-312. See also Petra Baumruk, (n 4), 156-163; Gabriel Bottini, (n 7), 549- 560; Mahmoud Cherif Bassiouni, (n 5), 125-138.

[16] Report of the Sixth Committee, 64th session on "the scope and application of the principle of universal jurisdiction", UN. Doc. No. A/62/425 (16 December 2009); UNGA Resolution, 64th Session, Agenda 84,

as quickly as expected, and at the beginning of 2018, the African Union expressed disappointment regarding an "impasse" on UJ within the UN General Assembly, calling for the Assembly's African Group to propose methods for progressing the discussion at the New York summit. Failure to achieve significant movement on this issue to date may be partly based on a lack of political consensus around selectivity and arbitrariness in applying the principle of universality. For example, at the debate of the General Assembly on UJ in 2017, while almost all delegates agreed that there was a need to make progress, there were differences concerning how to define the concept, its scope, character and limitations, which have been present in each debate since 2010.[17] Consequently, it is clear that there is still a lack of uniform international regulation for exercising UJ. Thus, the research seeks to address this issue.

Because of the vagueness in the definition of, and issues connected to, the principle of universality, when this principle has been applied, it has, at times, led to tensions between states, and this can be seen currently. Thus, this study will discuss the principle of universality to provide a proposal that summarises the concept and scope of UJ in a way that could achieve international recognition. In addition, legal study of UJ by the International Law Commission (the Commission/the ILC) is also recommended. In this regard, the ILC should have a significant role in determining and codifying UJ. This is due to the fact that the ILC's effort in treaties and other texts produced is typically described as "a major contribution to the development of a significant portion of international law".[18] Consequently, such study on UJ by the ILC could lead to commentary and conclusions that will benefit tribunals, courts, international organisations, academics and professionals involved in international law. Based on its distinctive mandate and its previous and present work within international criminal law concerning this topic, the Commission is uniquely positioned to contribute to this regard.

Resolution adopted by the General Assembly on 16 December 2009 [on the report of the Sixth Committee (A/64/452)], No. A/RES/64/117, (15 January 2010).

[17] Charles Chernor Jalloh, (n 1), para 12, at 311-312.

[18] Robert Jennings and Arthur Watts, Oppenheim's International Law: Volume 1 Peace: Introduction and Part 1 (9th edn, Longman 1992) 30.

1.2: Research Questions and Significance

The main aim of this thesis is to answer the following question: how far the concept of UJ has evolved, and to explore what should be done to enhance it further in the near future? This question opens up another further sub-questions, which are: What is UJ? What is its scope? How it should be exercised? What role can be expected of the ILC in codifying it?

As mentioned above, UJ has played a significant role in addressing the issue of impunity, but it is important to note the different perspectives and approaches taken with regard to the scope and application of this jurisdiction. An application lacking caution might lead to conflict between states, especially where developed nations claim jurisdiction over individuals from developing states. It is necessary to build measures to prevent the jurisdiction being politically or selectively applied. In particular, political figures from non-African states and judges have referred to this as the 'tyranny of judges' or 'new tyranny'. Clarity in guidance for exercising and implementing UJ would be beneficial to prevent this principle from being selectively applied.[19]

Indeed, UJ has long been a part of international law, with an extensive body of literature discussing this principle. However, there is little clarity and much confusion surrounding this area, with varied opinions and perspectives continuing to the present day.[20] Scholars differ in terms of defining UJ, setting its scope, and considering how it is implemented, leading the principle to be inconsistently defined across different state-level legislatures.[21] In addition, there is no agreement on the criminal acts to which it may be applied. This is in regards to state law and the actions of the judiciary of various states, meaning that it is, at times, applied to activities that do not meet the fundamental criteria for its application.[22] This lack of clarity

[19] Petra Baumruk, (n 4), 3. See also The Sixth Committee of UNGA, Delegations Urge Clear Rules to Avoid Abuse of Universal Jurisdiction Principle, Seek Further Guidance from International Law Commission, 67th, 12th Meeting17 October 2012, GA/L/3441. Available at https://www.un.org/press/en/2012/gal3441.doc.htm. [Accessed 16/1/2020].

[20] Charles Chernor Jalloh, (n 1), para 12, at 311-312.

[21] Ibid, para 8, at 309-310; Claus Kreb, (n 6), 563. See also Antonio Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction', (2003) 1 Journal of International Criminal Justice, 589.

[22] Sixth Committee of the UNGA, Informal Working Paper prepared by the Chairperson for discussion in the Working Group - The scope and application of the principle of universal jurisdiction [87], is for the purpose of facilitating further discussion in the light of previous exchanges of views within the Working Group, pp. 1-7 (4 November 2016) It merges various informal papers developed in the course of the work of the Working Group between (2011 - 2014). available at http://papersmart.unmeetings.org/media2/19409767/wg-universal-

and consensus has meant that development and progression has been impeded.[23] Furthermore, the spectrum across which UJ is applied has inevitable impacts on multiple legal practices and ideas internationally, and in particular comes into conflict with principles of non-interventionism and the sovereign status of states. It is therefore necessary to balance the conflicting applications of UJ and national sovereignty in such a way that the state is not compromised, yet crimes relevant to UJ are punished.[24]

Therefore, the current study presents a direct discussion of the principle's scope and character, investigating recent events in the international criminal legal system on the basis of two significant concerns: firstly, in connection with the lacuna of jurisdiction that enables impunity; and secondly, related to ensuring fair, impartial and foreseeable treatment, and protecting human rights. UJ is, at times, described as unique in nature, which hints at its individual character and the importance of the type of crime committed in the applicability of the jurisdiction. Its description as unique, however, is not held to mean that it is to be routinely used for significant international criminal acts, with the stipulation that it is to be applied only when other routes fail.

In line with this, the study examines criminal actions and legal cases related to the most serious international crimes, which are severe enough to be within the scope of UJ, prompting its implementation. There could not be any justification for committing these heinous acts as they are contrary to basic human rights, such as dignity or the right to life, and therefore there is no possible derogation from these. Under current international law, the only criminal activity that has not been disputed in terms of the applicability of UJ is piracy,[25] while there remain questions over the legality of exercising UJ over the most serious international

jurisdiction-informal-working-paper.pdf (Accessed, 5/12/2019) [hereinafter Sixth Committee of the UNGA, informal working paper].

[23] African Union, Decision on the International Criminal Court, Assembly/AU/Dec.672(XXX), Doc.EX.CL/1068(XXXII), para. 5(v), p. 2. In Assembly/AU/Dec.665-689(XXX), Thirtieth Ordinary Session, Addis Ababa, Ethiopia, 28–29 January 2018.

[24] Petra Baumruk, (n 4), 2.

[25] Harvard Research in International Law, Draft Convention on Jurisdiction with Respect to Crime, (1935) 29 The American Journal of International Law art 9, pp 440; Mahmoud Cherif Bassiouni, (n 5), 108. See also Malcolm N Shaw, *International Law*, (6th edn. Cambridge University Press, 2008) 611. Separate Opinion of President Guillaume to the Judgment of 14 February 2002, available at http://www.icj-cij.org/files/case-related/121/121-20020214-JUD-01-01-EN.pdf. the Separate Opinion in case of the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment, Feb. 14, 2002), available at http://www.icj-cij.org/docket/files/121/8126.pdf [hereinafter Arrest Warrant Case].

crimes.[26] Thus, the study could usefully set out the scope of UJ, possibly including the preparation of an illustrative list of criminal actions that fall within this jurisdiction. For example, the study will explore how UJ can be deduced from state practice for crimes against humanity, genocide and war crimes. Additionally, it could also be beneficial to examine states' practice of UJ to find out whether the exercise of UJ over the most serious crimes has existed as a rule of customary international law.

As has been noted, unconstrained application of UJ might lead to state-state conflict in terms of jurisdiction.[27] Equally, the individual might suffer from abuse of process, and others might be prosecuted based on political motivations.[28] Applying the principle where it is not justified can increase tensions between states, being interpreted as a tool for intervening in the domestic affairs of other state, or could be used as a tool of hegemony on the part of developed states to prosecute those in developing nations.[29] In considering the constraints of UJ, it is clear that when it is applied, established international legal norms should be taken into account because UJ can affect international relations much more than other principles of jurisdiction. These principles include the status of states as equal in sovereignty, the principle of non-intervention, and the immunity given to officers of the state. International legal systems have applied these principles over many years, and, due to this, they have a clear role in limiting the scope of UJ. In particular, the sovereignty of states is frequently subject to challenge and brought into question where UJ is considered. Thus, it could also be beneficial to explore points of conflict between states that could emerge, such as dispute resolution where more than one state asserts jurisdiction, which may happen where jurisdictions are concurrent which is more likely with UJ.

In summary, UJ forms only part of the movement within the international judicial and legal system to combat criminal impunity, but it is a vital one, which deserves in-depth consideration. The wide-ranging views of how UJ should be defined and applied is evidence that greater research attention is needed in this area.[30] One view holds that the emergence

[26] Matthew Garrod, Unraveling the Confused Relationship between Treaty Obligations to Extradite or Prosecute and Universal Jurisdiction in the Light of the Habre Case, (2018) 59 Harvard International Law journal. 172.
[27] Charles Chernor Jalloh, (n 1), para 17 at 312.
[28] Gabriel Bottini, (n 7), 559; Olympia Bekou and Robert Cryer, (n 13), 56.
[29] Gabriel Bottini, (n 7),556-559; Petra Baumruk, (n 4), 160.
[30] Charles Chernor Jalloh, (n 1), para 27 at 316.

of UJ was intended to lead to more international criminal prosecutions where states failed to do pursue these. However, this begs the question of why it is so rarely applied.

A broad definition of the concept of UJ exists, alongside what it broadly contains. However, there remains the challenging issue of determining what crimes it can be applied to and issuing guidance for the situations in which it should be applied, and the method for doing so. Therefore, the study could usefully set out to define UJ at a foundational level, clarify its aims and roles, categorise different forms of this jurisdiction and identify in state practice the circumstances and conditions for its application. For example, it would be useful to analyse whether there is the capacity or tendency to apply the principle only when the accused persons are present within the state's territorial boundaries. It will also identify legal grounds for jurisdiction claims within international law, based on custom and treaty, as well as considering the basis for decisions over whether prosecution should be at the state's discretion, or whether it is an obligation. Indeed, a correct and clearer understanding of it will help avoid conflicts and disputes over jurisdiction.

1.3: Research Methodology

This doctoral legal research concentrates on the uses and misuses of the universality principle in international law.[31] The universality principle is an exceptional form of traditional jurisdiction that allows national courts to exercise criminal jurisdiction over the most serious crimes on behalf of the international community, regardless of who commits them and where they are committed.[32] This is a result of the fact that the nature of these crimes affects the interests of the international community.[33] Consequently, the universality principle gives rise to some political and legal issues, including potential clashes with the principles of state

[31] Freund Kahn, 'On Uses and Misuses of Comparative Law', (1974) 37 The Modern Law Review 1. See also Cheryl Saunders, 'The Use and Misuse of Comparative Constitutional Law', (2006) 13 Indiana Journal of Global Legal Studies 37.

[32] Fausto Pocar and Magali Maystre, 'The Principle of Complementarity: A Means Towards a More Pragmatic Enforcement of the Goal Pursued by Universal Jurisdiction?', in Morten Bergsmo (ed), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes,* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 262.

[33] The Princeton Principles on Universal Jurisdiction, (n 9), 28-30.

sovereignty and diplomatic immunity.[34] Indeed, such issues have not yet been settled, although they have been widely discussed in scholarly literature.[35]

In order to discuss the research questions, the methodological approach used in this research is a doctrinal method that "asks what the law is in a particular area".[36] The doctrinal method will be the main approach of this research in order to understand UJ more deeply, rather than to discover new insights.[37] As Michael Pendleton argued, "In Law, and in the humanities and social sciences generally, it may seem that one does not 'discover new truths' but that one merely reviews and analyses (or synthesises) past and present social phenomena".[38]

Therefore, the doctrinal approach is used to provide a systematic exposition of UJ including analyses of the historical, philosophical, legal and political implications of this concept. It is useful to mention that the doctrinal study is used to help gain a deeper understanding of the nature and underpinnings of UJ, as well as to discuss the remarkable recognition of UJ under international law after World War II. [39] A large number of states have recently stressed that they have an international obligation to fight against impunity by exercising UJ over the most serious international crimes.[40] Therefore, doctrinal legal research adopts an internal perspective, using established legal sources and methods as reflected in legal practice. In addition, it requires the assessment of both the positive and negative sides of states' implementation of UJ, and the difficulties that have faced those states.[41]

The doctrinal legal research will focus on the existing primary and secondary sources that are relevant to states' implementation of UJ. As stated above, the primary sources involve national legislation, international conventions, judgements of the International Court of

[34] Gabriel Bottini, (n 7), 550.
[35] Petra Baumruk, (n 4), 156-163. See also Gabriel Bottini, (n 7), 549- 560. See also Mahmoud Cherif Bassiouni, (n 5), 125-138.
[36] Mike McConville and Wing Hong Chui (eds), *Research Methods for Law*, (Edinburgh University Press 2007) 19. See also Muath Al-Zoubi, *An Analysis of the Crime of Trafficking in Persons under International Law with a Special Focus on Jordanian Legislation*, (PhD Thesis Brunel University London 2015) 7.
[37] Mike McConville and Wing Hong Chui, (n 36), 29.
[38] Michael Pendleton, 'Non-empirical Discovery in Legal Scholarship – Choosing, Researching and Writing a Traditional Scholarly Article', in Mike McConville and Wing Hong Chui, *Research Methods for Law*, (Edinburgh University Press 2007) 161.
[39] Charles Oluwarotimi Olubokun, *The Future of Prosecutions under the International Criminal Court*, (PhD Thesis Brunel University London, 2015) 87.
[40] Kevin Jon Heller, 'What Is an International Crime? (A Revisionist History)', (2017) 58 Harvard International Law Journal 353, 368.
[41] Gabriel Bottini, (n 7), 510.

Justice and the Reports of the Sixth Committee of the UN since 2009.[42] The analysis of secondary sources will include published works on state implementation of UJ. The research will analyse the above materials by using the doctrinal approach to determine the scope and legal elements of exercising UJ.

It is also worth mentioning that the methodology used by some of the previous studies often confused a *lex lata lex ferenda* study of law as law with the study of law as it should be.[43] Hence, some studies were not built on a sound basis because they relied on *lex ferenda* as the starting point for their research.[44] In order to build this research on a sound basis, the starting point will be a discussion of law as law (*lex lata*), which can be achieved through an assessment of States' position on UJ.[45] Accordingly, this research assesses the position of states on UJ to ascertain the existence of UJ under customary international law. This assessment is based on the findings from a survey of 72 countries. It is worth mentioning that it is not required that a rule should be exercised by a certain number of States in order to be considered an international custom, but rather there is a need to prove that such a rule is widely exercised, coupled with the appropriate *opinio juris*.

Based on this approach, the preconditions for UJ that are drawn from state practice will be discussed.[46] The research will also examine the possibility of how some of the views on UJ should be exercised *lex ferenda*. This includes discussing the possibility of granting UJ to an international criminal court, and the possibility of codifying UJ.

This methodology will help the research achieve its goal, which is to provide a proposal that summarises the concept and scope of UJ. The research also aims to recommend that the ILC play a role in codifying UJ. For this, the research aims to put this proposal in the hands of the ILC in order to help them draft articles on UJ. Consequently, the use of the doctrinal method to study states' implementation will help to highlight the disadvantages and difficulties that

[42] Report of the Sixth Committee, (n 16). UNGA Resolution, (n 16).
[43] Noora Arajärvi, 'Between Lex Lata and Lex Ferenda - Customary International (Criminal) law and the Principle of Legality', (2011) 15 Tilburg Law Review 163, 165.
[44] Fons Coomans, Fred Grünfeld and Menno T. Kamminga, 'Methods of Human Rights Research: A Primer', (2010) 32 Human Rights Quarterly, 179, 180. See also Report of the International Law Commission on the Work of its 70th Session' (30 April–1 June and 2 July–10 August 2018) UN. Doc. No. A/73/10, conclusion 3, 119.
[45] Noora Arajärvi, (n 43), 168.
[46] Report of the UN Secretary-General, The scope and application of the principle of universal jurisdiction, Sixty-sixth session, UN. Doc. No. A/66/93 (20 June 2011), para 63-100, at 13-20.

have faced the implementation of UJ and argue how these issues can be solved by the codification of legal standards.

1.4: Research Structure

This research consists of seven chapters. The first one is the introductory chapter, which deals with the research background, research significance, research aims and questions, overview and methodology, and structure of the study.

The second chapter is organised to secure a deeper understanding of the nature of UJ as a legal phenomenon, including research on the historical and philosophical perspective of this concept. In this matter, the historical and philosophical background of UJ has been traced back to the sixth century in the Code of Justinian.[47] This chapter is divided into two main sections. Firstly, the historical roots of UJ, which sheds light on how the historical and philosophical background of UJ has paved the way for the emergence of the principle under customary international law, as an exceptional form of traditional or classic jurisdiction. This section will focus on three main issues: the appearance of UJ as a concept in the Justinian Civil Code. Then, it will examine the concept of *actio popularis* under Roman law to determine whether such a concept could be equivalent to the principle of UJ or not. Since the emergence of Islamic law coincided with the era of Justinian Civil Code in the sixth century AD, the research will discuss the position of Islamic law on UJ.

The second section of this chapter focuses on the historical development of UJ in international law. It addresses the legal development of UJ in international law that began with its recognition under international customary law over piracy. In addition, it highlights the importance of the *Lotus* Case to understand the development of extraterritorial jurisdiction without traditional links. Finally, the research will discuss the increase in the exercise of UJ since the end of the 1990s as a stage of the development of UJ.

[47] Harry Gould, *The legacy of punishment in international law*, (1st edn, Palgrave Macmillan, 2010) 11; Paola Gaeta, 'Donnedieu De Vabres On Universal Jurisdiction Introductory Note', (2001) 9 Journal of International Criminal Justice 905, 907.

The third chapter examines the definition of UJ and the legal framework for its exercise. Therefore, the research discusses the definition of UJ. Following this, in order to determine the scope of the principle, the research examines the international crimes for which UJ can be exercised. This involves an examination of the crime of piracy as a historical basis for UJ as the 'classic' UJ. Then, it discusses the crimes that have been recently recognised as being subject to 'modern' UJ. These crimes involve war crimes, genocide, the crime of torture and crimes against humanity. It is worth noting that the ICC recently has considered the destruction of the environment as a crime against humanity.[48] Therefore, the research examines the possibility of exercising UJ over environmental destruction and the crime of terrorism in the absence of a uniform international definition of terrorism.

The fourth chapter examines states' practice of UJ in order to discuss the following points: Firstly, whether the exercise of UJ over the most serious crimes exists as rule of customary international law. Secondly, to determine the preconditions for UJ that are required in accordance with states' practice. Thirdly, it highlights the difficulties that have faced states when they have practiced UJ, in order to overcome them in a possible future codification of UJ.

The fifth chapter discusses the relationship between UJ and international criminal institutions. It discusses the reasons behind the monopoly of the practice of UJ by the national courts of states, in the absence of practice by international courts. It discusses the reasons for the failure of international efforts to grant UJ to an international tribunal and discusses the possibility of granting UJ to the current ICC, or any other international court. The chapter also covers the possible regional or international mechanisms for supporting national courts in the exercise of UJ. This includes the establishment of the Extraordinary African Chambers by Senegal and the African Union via regional cooperation to exercise UJ in an efficient and impartial manner.

The sixth chapter examines the possibility of codifying UJ. The chapter argues that the ILC, through their role in the codification of international law, should contribute to determining the scope and application of the principle of UJ. To discuss this issue, the research analyses

[48] Office of the Prosecutor of the ICC, Policy paper on case selection and prioritisation,15 September 2016, see par 40,41. pp 134-14. Available at https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf (accessed 29 April 2019).

previous efforts to codify the principle of UJ. The international and regional efforts are highlighted as is the work of the UN Sixth Committee since 2009, or AU-EU Expert Report on the Principle of UJ. In addition, some of the previous proposals to clarify the universal mandate, such as Princeton's principles on UJ, are explored. In this regard, the research evaluates these proposals in order to take lessons from them for any possible future codification of UJ by the ILC.

Secondly, this chapter examines the position of the ILC on the codification of UJ. The aim of this is to clarify the position of the ILC on UJ and why it has not been discussed extensively to date. Thirdly, it examines the recent decision by the ILC to include the topic of UJ in the its Long-term Programme of Work.[49] In this matter, this section examines whether UJ satisfies the criteria in order to be added to the Long-Term Programme of Work. Finally, this chapter discusses the desired and potential outcomes from the codification of UJ.

The seventh chapter concludes this thesis by providing study summaries, as well as recommendations.

[49] Report of the International Law Commission, (n 44), para 37, p 9.

Chapter Two: Legal History of Universal Jurisdiction (UJ) and its Emergence Under International Law

2.1: Introduction

A significant number of scholars writing on the principle of UJ rely on the historical background of the principle of universality and its development to explain modern UJ.[1] Therefore, this chapter develops a clear understanding of the nature of UJ as a legal phenomenon by engaging with the historical of this principle. In so doing, it also discusses the philosophical, social and political implications of the principle. This chapter initially discusses the legal history of this principle and its emergence as an exceptional form of traditional or classic jurisdiction. Following this, the historical development of UJ is examined, specifically the legal recognition and development of UJ under customary and Conventional international law. Additionally, the chapter considers the importance of the Lotus Case in understanding the development of extraterritorial Jurisdiction without traditional links.[2] Finally, the research will discuss the substantial increase in the exercise of UJ since the end of the 1990s.

2.2: Historical Concepts Equivalent to UJ

It has been argued that UJ has its roots in the sixth century Code of Justinian.[3] It has also been claimed that the concept of *actio popularis* in Roman law could be seen as the equivalent of

[1] Claus Kreb, Universal Jurisdiction over International Crimes and the Institut de Droit international, (2006) 4 Journal of International Criminal Justice, 573-576. See also Mahmoud Cherif Bassiouni, 'Universal jurisdiction for international crimes: historical perspectives and contemporary practice', (2001) 42 Virginia Journal of International Law 81, 108. See also Harry Gould, *The legacy of punishment in international law*, (1st edn, Palgrave Macmillan, 2010) 84. See also Malcolm N Shaw, *International Law*, (6th edn. Cambridge University Press, 2008) 609.

[2] The Case of the S.S. 'Lotus' (France v. Turkey), Judgment, 7 September 1927, PCIJ Series A, No. 10. [hereinafter Lotus Case]

[3] Harry Gould, (n 1), 11; Paola Gaeta, 'Donnedieu De Vabres On Universal Jurisdiction Introductory Note', (2001) 9 Journal of International Criminal Justice 905, 907.

the principle of UJ.[4] Hence, the research will discuss these two claims to indicate the historical roots that paved the way for the emergence of UJ.

It is worth mentioning that the emergence of the Islamic religion, whose rules and principles are known today as "Islamic law" coincided with this period.[5] Additionally, the Roman notion of *actio popularis*, was known under Islamic law as the concept of *Al-Hisbah*.[6] Accordingly, it is useful here to investigate whether the concept of *Al-Hisbah* is similar to the principle of UJ.

2.2.1: Historical and Philosophical Background to UJ since the Justinian Civil Code

The notion of UJ is an old concept, which, as Christopher Keith notes, is rooted in the Justinian Code "Codex Justinianus" 529 to 565, from the 6th century.[7] The Justinian Code is a collection of regulations and legal interpretations that Eastern Roman Emperor Justinian ordered to be codified during his reign.[8]

In terms of criminal jurisdiction, it has been argued that criminal jurisdiction under Justinian Code was conferred to the court of the place where the crime was committed, and to the court of the place where the accused was arrested (*judex deprehensionis*).[9] In light of this, the criminal jurisdiction was conferred to the city where particular categories of dangerous offenders such as *ç vagabundi , assassin,* ç *banniti* appeared.[10] Accordingly, the accused of was subject to a quasi-UJ due to the societal threat their crime presented.[11] Paola Gaeta argued that "the jurisdiction of the judex deprehensionis is justified by the social trouble caused on a territory by the presence of the unpunished criminal".[12] It is clear that the

[4] Ibid, 70; Rubin Alfred, 'Actio popularis, jus cogens and offenses erga omnes?', (2001) 35 New England Law Review 265, 268.
[5] Khaled Abou El Fadl, *Reasoning with God: Reclaiming Shari 'ah in the Modern Age,* (1st edn, Rowman & Littlefield, 2014), xxxii. See also Michael Cook, *Forbidding Wrong in Islam: An introduction*, (1st end, Cambridge University Press 2003) 5-7.
[6] Adnan El Amine, 'Culture of law at Arab universities', (2017) 10 Contemporary Arab Affairs 392, 393.
[7] Harry Gould, (n 1), 84. See also Christopher Keith Hall, 'Universal Jurisdiction: New Uses for an Old Tool', in Mark Lattimer and Philippe Sands (eds), *Justice for Crimes Against Humanity*, (1st edn Oxford: Hart 2003) 50.
[8] Francis Fukuyama, *The origins of political order: from prehuman times to the French Revolution*, (1st edn, Farrar, Straus Giroux, 2011) 268.
[9] Paola Gaeta, (n 3), 907-908.
[10] Ibid.
[11] Christopher Keith Hall, (n 7), 50.
[12] Paola Gaeta, (n 3), 908.

Justinian Code allowed the city where the accused was based to exercise jurisdiction.[13] Moreover, during the Middle Ages the notion of *judex deprehensionis* was accepted as kind of criminal jurisdiction in Italian doctrine and the regulations governing relations between the cities of Lombardy.[14]

It is worth mentioning that the Roman jurists, in their comments on the code of Justinian, recognised quasi-UJ for the court of the place where the offender was arrested. In this regard, Accursius (1182 – 1263),[15] argued that the crime of vagrancy required a special law because the vagrant does not have a known place of residence; therefore they should be tried wherever they were discovered as a presumed place of residence.[16] In addition, Bartolus de Saxoferrato (1313 – 1357), a Medieval professor of law and one of the most influential jurists of Roman law,[17] claimed that jurisdiction should lie with the court of the place where the offender was arrested and that jurisdiction could be based in the place where the accused was located or where any stolen objects were transferred.[18]

Furthermore, Covarivias, also known as Diego de Covarubias y Leyva (1512 – 1577), who was a Roman Catholic and Spanish jurist,[19] argued that the jurisdiction of the court of the place where the offender was arrested should not only be exercised on the crime of vagrancy, as Accursius said, because it would be unfair and abusive**.** Rather**,** he suggested that all serious crimes should be subject to such jurisdiction either by extradition or prosecution.[20]

During the Renaissance, jurists such as Hugo Grotius (1583–1645) continued to give significant attention to the issue of jurisdiction.[21] Grotius laid the foundations for international law based

[13] Dechlavi Sufyan, *Universal jurisdiction for the national courts over War crimes, genocide and Crimes against humanity*, (PhD Thesis Mouloud Mammeri University of Tizi-Ouzou- Algeria 2014) 17.
[14] Ryan Rabinovitch, 'Universal Jurisdiction in Abstentia', (2004) 28 Fordham International Law Journal 500, 517.
[15] Franciscus Accursius, Encyclopædia Britannica, <https://www.britannica.com/biography/Franciscus-Accursius> accessed 12 October 2017.
[16] Ryngaert Cedric, *Jurisdiction in International Law*, (2edn, Oxford University Press 2015) 52-53.
[17] Bartolus of Saxoferrato, Encyclopædia Britannica, < https://www.britannica.com/biography/Bartolus-of-Saxoferrato> accessed 12 October 2017.
[18] Dechlavi Sufyan, (n 13), 18.
[19] Peter Haggenmacher, 'Just War and Regular War in Sixteenth Century Spanish Doctrine', (1992) 32 International Review of the Red Cross 434, 442.
[20] Dechlavi Sufyan, (n 13), 19.
[21] Amnesty International, Universal Jurisdiction: The Duty of States to Enact and Enforce Legislation: Chapter 2: The Evolution of The Practice of Universal Jurisdiction 31 August 2001, Ior 53/004/2001, p 1. available at <https://www.amnesty.org/en/documents/document/?indexNumber=IOR53%2F004%2F2001&language=en> Accessed on 9/11/2017.

on natural law and was the first jurist to develop the philosophical value and scope of UJ.[22] In fact, he argued that natural law is the main basis for international law because it is inscribed in the individual conscience, although it is unwritten.[23] Thus, the law of human solidarity was formulated by him, which he believed subsisted in a universal society of mankind: "*societas generis humani*".[24] Accordingly, international crime should be considered a violation of natural law, so a universal obligation to punish either by punish or extradite should be the responsibility of the state where the offender was located.[25] As Cedric argues: "[t]he obligation to punish that it engenders is universal it is reflected, for the State into whose power the criminal has fallen, by the famous alternative, to extradite or to punish: aut dedere, aut punier".[26]

It is worth mentioning that Grotius' philosophy on the law of human solidarity played a prominent role in the later emergence of the international customary rule that considers the principle of UJ as criminal jurisdiction over crimes of maritime piracy. This is due to the particular circumstances concerning piracy, such as that the crime scene is usually the high seas.[27] Accordingly, piracy is considered to be a violation of *jus cogens*, due to the fact that it violates the freedom of the high seas.[28] In fact, as result of the serious and persistent threat to the freedom of navigation and international traffic posed by piracy, international customary law has long considered piracy a crime against the interests of the entire international community.[29]

In light of above analysis, it is clear that the term 'UJ' was not mentioned directly in the Justinian Code. However, quasi-UJ was recognised[30] and the application of such jurisdiction was based on two main elements. Firstly, the nature of the crime that threatens the society's security due to the difficulty of arresting and prosecuting the perpetrators,[31] which some

[22] Paola Gaeta, (n 3), 907; Yana Shy Kraytman, 'Universal Jurisdiction – Historical Roots and Modern Implications', (2005) 2 Brussels Journal of International Studies 94, 120.
[23] Ryngaert Cedric, (n 16), 150.
[24] Yana Shy Kraytman, (n 22), 120.
[25] Paola Gaeta, (n 3), 908.
[26] Ryngaert Cedric, (n 16), 52.
[27] Malcolm N Shaw, (n 1), 609.
[28] Kamrul Hossain, 'The Concept of Jus Cogens and the Obligation Under the U.N. Charter', (2005) 3 Santa Clara Journal of International Law 72, 74.
[29] Mahmoud Cherif Bassiouni, (n 1), 108-109. Harry Gould, (n 1), 84. See also Malcolm N Shaw, (n 1), 609.
[30] Yana Shy Kraytman, (n 22), 120.
[31] Ibid.

Roman jurists limited to the crimes of *vagabundi, assassin, banniti*.[32] By contrast, other jurists believed that UJ should not focus only on the above-mentioned crimes but should be exercised over all serious crimes.[33]

The second key element was the presence of the offender, because jurisdiction could not be exercised in their absence.[34] Therefore it is clear that absolute jurisdiction was not included under the Justinian Code, because jurisdiction was granted to the court of the place where the accused was arrested: "*judex deprehensionis*".[35] Consequently, the fulfilling of both of the above elements authorised the State where the criminal has fallen in its power, to punish the offender.[36]

2.2.2: The Manner of UJ Equivalent to the Concept of Actio Popularis

Actio popularis in Roman Law signifies the legitimacy for any third party to bring a lawsuit on behalf of the state in the interest of the whole community.[37] Aaron and Maurice note that *Actio popularis*, or action at law of the people, is a public right to bring a legal action or lawsuit. This term is frequently used in domestic law to highlight the right of any third party to initiate a lawsuit on behalf of the state.[38] By contrast, *Actio personalis,* also known as a personal action, is defined as "a private right of action, as opposed to one invoking a state or governmental interest".[39] In fact, *Actio popularis* allows any member of the public to take legal action in the interest of whole society.[40] In general, *Actio popularis* include three

[32] Paola Gaeta, (n 3), 907-908.
[33] Ilkka Pyysiäinen ed, *Religion, Economy, and Cooperation,* (1st edn, Deutsche Nationalbibliothek, 2010) 137.
[34] Ryan Rabinovitch, (n 14), 517.
[35] Ryngaert Cedric, (n 16), 127.
[36] Peter Weiss, 'Universal Jurisdiction: Past, Present and Future', (2008) 102 American Society of International Law 406, 407.
[37] Harry Gould, (n 1), 67. See also Actio Popularis Law and Legal Definition, USLegal, < https://definitions.uslegal.com/a/actio-popularis/> accessed 18/10/17
[38] Aaron X. Fellmeth and Maurice Horwitz, *Guide to Latin in International Law*, (1st edn, Oxford University Press, 2009) 12.
[39] Ibid, 11. See also Harmen van der Wilt, 'Sadder but Wiser'? NGOs and Universal Jurisdiction for International Crimes', (2015) 13 Journal of International Criminal Justice 237, 238.
[40] Farid Ahmadov, *The Right of Actio Popularis before International Courts and Tribunals*, (Brill Nijhoff, 2018) 14.

important elements. Firstly, the existence of a violation that harms the interests of society.[41] Secondly, a legal action is taken by a third party or stranger who has no direct interest to bring a lawsuit against the perpetrators of the violation.[42] Thirdly, the aim of taking the legal action is to achieve a general interest for the community and not a personal interest.[43] The question that arises here is whether states continue to believe they have a real legal interest in engaging in UJ as an *actio popularis*.

Professor Egon Schwelb attempted to position Roman law as supporting the principle of UJ. Indeed, his article was the first attempt to develop a consensus on UJ in the international community in the 1970s.[44] In this matter, it was mentioned that

> [t]he first attempts to gain a consensus on universal jurisdiction to adjudicate in the world of the 1970's was probably based on a much-cited article by Professor Egon Schwelb seeking to revive the ancient Roman law under which a stranger could bring a case on behalf of an injured slave, where the slave had no "standing" in a Roman tribunal to bring the action him or herself.[45]

In fact, Professor Schwelb suggested that UJ could be regarded as the equivalent of *actio popularis,* which allowed a stranger to bring a lawsuit on behalf of a wounded slave, who would have been forbidden to bring the action themselves.[46] However, this argument was criticised, firstly, by claiming that Roman law was too narrow and so could not be a source of UJ and, secondly, by the suggestion that if *action popularis* were to be revived then would that also mean that other elements of Roman law, such as slavery, might be as well.[47]

It is worth mentioning that International Court of Justice (ICJ) addressed the issue of *actio popularis* in international law in the South West Africa Cases (*Ethiopia V. South Africa*; *Liberia V. South Africa*). In these cases, the court refused the allow the argument that taking legal

[41] Ibid, 15.
[42] Ibid
[43] Ibid.
[44] Rubin Alfred, (n 4) 268. See also Harry Gould, (n 1), p 70. Egon Schwelb, 'The Actio Popularis and International Law', (1972) 2 Israel Yearbook Human Rights 46, 47.
[45] Ibid.
[46] Egon Schwelb, (n 44) 47.
[47] Ibid. Rubin Alfred, (n 4) 268.

action by third party is allowed in the public interest.[48] The court justified their decision by refusing the principle of *actio popularis* as international principle. In this matter the ICJ said that

> although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present: nor is the Court able to regard it as imported by the "general principles of law" referred to in Article 38, paragraph 1 (c), of its Statute.[49]

However, the court decision was immediately objected to by some scholars, including Schwelb who claimed that the principle of *actio popularis* was known in international law and was cited as principle in multiple international treaties.[50]

However, in the case of Barcelona Traction, Light and Power Company, Limited, (*Belgium V. Spain*) Second Phase, the ICJ recognised the concept of *actio popularis* under the aspect of obligations *erga omnes*.[51] However, it was argued that "the concepts of obligations erga omnes and actio popularis, though associated in some respects, are distinct and independent of one another."[52] Although the two concepts are independent the court decision reflected the acceptance of *actio popularis*, though not by name.[53] In fact, it can be claimed that the exercising of *actio popularis* could take place when the rules *erga omnes* are violated.[54] In this matter, the Court stated that

> in particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States

[48] South West Africa, Second Phase, Judgment, I.C.J. Reports 1966, p**.** *6*, South-West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa); Second Phase, International Court of Justice (ICJ), 18 July 1966, par 88. p 47. See also Malcolm N Shaw, (n 1), 355.
[49] Ibid. See also William J. Aceves, 'Actio Popularis - The Class Action in International Law', (2003) 1 University of Chicago Legal Forum 353, 357.
[50] Egon Schwelb, (n 44) 47. Harry Gould, (n 1), 70.
[51] William J. Aceves, (n 49), 357.
[52] Harry Gould, (n 1), 75.
[53] Christian Tomuschat and Jean-Marc Thouvenin eds, *The Fundamental Rules Of The International Legal Order Jus Cogens And Obligations Erga Omnes*, (1st edn, Martinus Nijhoff Publishers, 2006) 300.
[54] Harry Gould, (n 1), 78.

can be held to have a legal interest in their protection; they are obligations erga omnes.[55]

In light of this, it was argued that when any of the international obligations that concern all states are violated, *actio popularis* can be exercised on condition that domestic remedies have been exhausted.[56] This is due to the fact that under a multilateral treaty which allows a third party to bring an action to be heard in court when an *erga omnes* concept is violated.[57] Such as, the action that has been taken recently by Gambia when file a case before the ICJ against Myanmar's violations of the Genocide Convention due to breaches committed against the Rohingya people.[58] It must be stressed that the case filed by Gambia is not a criminal case, as the ICJ has no criminal jurisdiction. The research used this case as an example of the *erga omnes* that allows a third-party state to file a lawsuit before the ICJ.

The facts of this case are that a significant number of the Rohingya Muslims people in the State of Myanmar have been subjected to genocide since 25 August 2017.[59] As a result, the Gambia filed a lawsuit against the State of Myanmar before the ICJ for violating the provisions of the genocide Convention. Although the case is still under consideration by the ICJ, the court on 23 January 2020, issued a decision of provisional measures to stop any acts that violate the Genocide Convention.[60] Accordingly, it can be observed that when the obligations erga omnes are violated, a third party state is allowed to file a lawsuit in a manner that could be equivalent to actio popularis. It should be mentioned that the issues related to criminal prosecutions will be discussed in the following chapters.

[55] Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, p. 3. Barcelona Traction, Light and Power Company, Limited, (Belgium V. Spain) Second Phase, at 32.

[56] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at: http://www.refworld.org/docid/3ddb8f804.html [accessed 17 October 2017], See also Christian Tomuschat and Jean-Marc Thouvenin eds, (n 53), 269.

[57] Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law*, (Cambridge University Press, 2005) 186.

[58] The ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Request for the indication of provisional measures, (23 January 2020, General List No. 178).

[59] United Nations Human Rights Council, Report of the independent international fact-finding mission on Myanmar, UN. Doc. No. (A/HRC/42/50) 8 August 2019, para 23, at 6.

[60] The ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Request for the indication of provisional measures, (23 January 2020, General List No. 178).

Nevertheless, the question that remains is whether UJ is equivalent to *actio popularis*.[61] In this regard, Cherif Bassiouni followed the example of Egon Schwelb by claiming that "In the exercise of universal jurisdiction, a state acts on behalf of the international community in a manner equivalent to the Roman concept of actio popularis."[62] However, it is worth noting that unlike the *actio popularis*, *obligations erga omnes*, and *jus cogens*, UJ has a clear punitive motivation.[63]

Comparing the exercise of UJ with *actio popularis* it can be determined that the legal elements of both are similar because UJ involves prosecution undertaken in defence of a public interest, which is consistent with the aims of *actio popularis*.[64] In fact, both are designed to protect the public interest by following legal procedures.[65] In addition, their legal procedures are extraordinary.[66] To demonstrate this, the principle of *actio popularis* allows a stranger who may not have a direct interest in bringing a lawsuit on behalf of the state for the public interest, to do so. Similarly, the principle of UJ allows states to exercise criminal jurisdiction over several crimes on behalf of the entire international community in the absence of traditional links of jurisdiction.[67] Indeed, the principle of UJ allows each state to exercise jurisdiction over several crimes on behalf of the international community.[68] Unlike the crimes covered by classic bases of jurisdiction, there are certain serious crimes that have special characteristics so all states have an interest in their suppression.[69] In light of this, it could be claimed that despite of the independence of *actio popularis* and UJ they are still equivalent,[70] as noted they correspond in their extraordinary legal nature and their purpose.[71]

[61] Harmen van der Wilt, (n 39), 238.
[62] Mahmoud Cherif Bassiouni, (n 1), 88.
[63] Harry Gould, (n 1), 82. See also Kenneth C. Randall, 'Universal Jurisdiction Under International Law', (1988) 66 Texas Law Review 785, 830.
[64] Robert Cryer, *An Introduction to International Criminal Law and Procedure*, (2nd edn, Cambridge University Press, 2010) 355.
[65] Yana Shy Kraytman, (n 22), 123.
[66] Ryan Rabinovitch, (n 14), 521.
[67] Gabriel Bottini, 'Universal jurisdiction after the creation of the International Criminal Court', (2004) 36 New York University Journal of International Law and Politics 503, 521.
[68] Mahmoud Cherif Bassiouni, (n 1), 96.
[69] Gabriel Bottini, (n 67), 511.
[70] Kenneth C. Randall, (n 63), 831.
[71] REDRESS, Extraterritorial Jurisdiction in the European Union: A Study of the Laws and Practice in the 27 Member States of the European Union, p239, 1 December 2010, available at: http://www.refworld.org/docid/4d1a0104c.html [accessed 27 May 2017].

2.2.3: The Concept of Al-Hisbah under Islamic law and the Position of Islamic law on the Principle of UJ

As noted above, the principle of UJ is an old principle that can been traced back to the 6th century to Code of Justinian.[72] It Is noteworthy that the emergence of the religion of Islam, whose rules and principles are known today as "Islamic law" coincided with that period.[73] In fact, the criminal jurisdiction under Islamic law is the traditional jurisdiction that involves territorial jurisdiction, national jurisdiction, protective jurisdiction, and passive personality jurisdiction.[74] Thus, there is no explicit reference to the principle of UJ under Islamic law. Also, Islamic law has not used such term.[75] However, the Roman notion of *actio popularis*, was known under the Islamic law as the concept of *Al-Hisbah*.[76]

As it was argued above that the principle of *actio popularis* could be parallel to the principle of UJ,[77] the question that arises is whether the concept of *Al-Hisbah* might also be similar. Additionally, another question that arises is the position of Islamic law on UJ. To answer the above questions, firstly, the principle of *Al-Hisbah* will be defined and its sources under Islamic law will be discussed. Secondly, the position of Islamic law on international crimes and the obligation to prosecute the perpetrators will be discussed. Consequently, this section in general will examine the status of Islamic law in terms of the principle of UJ. It should be noted that studying the position of Islamic law is important because it will help in understanding the position of a large number of countries today that consider Islamic law a major source of its legislation.[78]

Islamic law is usually described by Orientalists and Muslims as the kernel and essence of Islam itself. In addition, it is considered to typify the Islamic way of life.[79] It has been argued that

[72] Christopher Keith Hall, (n 7), 50.
[73] Khaled Abou El Fadl, (n 5), xxxii; Michael Cook, (n 5) 5-7.
[74] Ahmad E. Nassar, 'The International Criminal Court and the Applicability of International Jurisdiction under Islamic Law', (2003) 4 Chicago Journal of International Law 587, 588-591.
[75] Ibid, 593-595.
[76] Adnan El Amine, (n 6), 393.
[77] William J. Aceves, (n 49), 355-360.
[78] e.g. see Constitution of the Republic of Iraq [Iraq], 15 October 2005, art 2, available at: https://www.refworld.org/docid/454f50804.html [accessed 19 August 2019].
[79] Mohamed Badar, 'Islamic law (Sharia) and the jurisdiction of the International Criminal Court', (2011) 24 Leiden Journal of International Law 411, 412. See also Khaled Abou El Fadl, (n 5), xxxii.

Islamic law is similar to Roman law because neither were originally a product of legislative authority or case law, but were established through jurists interpreting sacred texts.[80]

Indeed, the sources of Islamic law include the *Quran* which is the holy book for Muslims who believe that it is the word of Allah, "God" and it is considered to be the main source of Islamic law and the root of all other sources.[81] In addition, the *Sunnah*, in which Allah inspired Prophet Muhammad and the latter conveyed the concepts in his own words and practice, is considered the second main source of Islamic law.[82]

When an issue is not addressed in the *Quran* and *Sunnah* the third Islamic law source is Islamic jurisprudence: *Fiqh*.[83] *Fiqh* has three categories, firstly, *Ijma,* which indicates consensus among the Islamic jurists on a particular issue;[84] secondly, *Qiyas,* which indicates the extension of a provision to a new issue, not addressed in the *Quran*, the *Sunnah* or the *ijma*;[85] and, thirdly, *Ijtihad* (independent reasoning) which signifies the inference of a legal provision from rulings or analysis in the above-mentioned sources.[86]

None of these sources of Islamic law mention the principle of universal criminal jurisdiction.[87] However, Islamic law does recognise and exercise another concept called *Al-Hisbah* which can be said to be equal to the *actio popularis* in Roman Law.[88] *Al-Hisbah* denotes the moral duty of an individual to promote virtue and reject vice on behalf of society.[89] *Al-Hisbah* is defined as "the right and duty of every person to defend the rights of any other person and the

[80] Ibid, 413.
[81] Mashood Baderin, 'Understanding Islamic Law In Theory And Practice', (2009) 9 Legal Information Management 186, 186-188. See also Sheikh al-Zuhili, 'Islam and international law', (2005) 87 International Review of Red cross 269, 270.
[82] Khaled Abou El Fadl, (n 5), xxxiv; Michael Cook, (n 5) 7-9. See also Abdullahi Ahmed An-Na'im, 'Islamic Law, International Relations and Human Rights: Challenges and Response', (1987) 20 Cornell International Law Journal 317, 320-321.
[83] Mohamed Badar, (n 79), 416-417.
[84] Hossam ElDeeb, *The ratification and implementation of the Rome Statute of the International Criminal Court by the Arab states: prospects and challenges*, (PhD Thesis Brunel University London 2015) 203.
[85] Mohamed Badar, (n 79), 416-417.
[86] Hossam ElDeeb, (n 84), 203.
[87] Ahmad E. Nassar, (n 74), 591. See also Michael Cook, (n 5) 4-5.
[88] Michael Cook, *Commanding Right and Forbidding Wrong in Islamic Thought*, (1st edn, Cambridge; New York: Cambridge University Press, 2001) 14-17. See also the definition of the actio popularis in, Aaron X. Fellmeth and Maurice Horwitz. (n 38), 12.
[89] Gregory Mack, "Ḥisbah." In The [Oxford] Encyclopedia of Islam and Law. Oxford Islamic Studies Online. 29-Oct-2018. <http://www.oxfordislamicstudies.com/article/opr/t349/e0124>. See also Lorenzo Vidino, 'Hisba in Europe? Assessing a Murky Phenomenon', (2013) European Foundation for Democracy, Chapter 1, pp 14. available at <http://www.css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/pdfs/Hisba_in_Europe.pdf> [accessed 25 May 2017]

community in general".[90] In this way, the principle of *Al-Hisbah* is very similar to *actio popularis* as they both require the public to undertake some legal proceedings on behalf of the community for the public interests.[91] It should be noted that the term *Al-Hisbah* is not mentioned directly in the *Holy Quran* the main source of Islamic law.[92] However, it is derived from the principle of *Amr bi al-Maruf wa'l-Nahy an al-Munkar*[93] "enjoining good and forbidding wrong", which is mentioned in the Holy Quran.[94] For instance, Verse 3:104 states "Let there arise out of you a band of people inviting to all that is good, enjoining what is right, and forbidding what is wrong: They are the ones to attain felicity".[95] In addition, Verse 9:71 states "The Believers, men and women, are protectors one of another: they enjoin what is just, and forbid what is evil"[96]. Furthermore, the principle of "enjoining good and forbidding wrong" is present in the *Sunnah,* which holds that "Whoever amongst you sees an evil, he must change it with his hand; if he is unable to do so, then with his tongue; and if he is unable to do so, then with his heart; and that is the weakest form of Faith"[97]

Al-Hisbah is also supported by the Islamic principle of *Al-Taawun Al-Birr Wa Al-Taqwaa* (cooperation in goodness and devoutness).[98] This principle is mentioned in the *Holy Quran*: "cooperate in righteousness and piety, but do not cooperate in sin and aggression".[99] In this matter, Ibn Taymiyya (1263 - 1328), in the introduction to his thesis on *al-Hisba fī'l-islām* stressed the need for co-operation, association and mutual aid.[100] As mentioned, he argued that

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[90] Farhad Malekian, *The concept of Islamic International Criminal Law: A Comparative Study*, (1st edn, London, Graham and Trotman, 1994) 125.

[91] Rubin Alfred, (n 4), 268. See also Harry Gould, (n 1), 70.

[92] Lorenzo Vidino, (n 89).

[93] Amr bi al-Maruf wa'l-Nahy an al-Munkar, al-." In The Oxford Dictionary of Islam. Ed. John L. Esposito. Oxford Islamic Studies Online. 29-Oct-2018. <http://www.oxfordislamicstudies.com/article/opr/t125/e154>.

[94] Michael Cook, (n 88), 14-17.

[95] The Holy Quran, Verse 3:104 Al Imran, { وَلْتَكُن مِّنكُمْ أُمَّةٌ يَدْعُونَ إِلَى ٱلْخَيْرِ وَيَأْمُرُونَ بِٱلْمَعْرُوفِ وَيَنْهَوْنَ عَنِ ٱلْمُنكَرِ ۚ وَأُوْلَٰٓئِكَ هُمُ ٱلْمُفْلِحُونَ}, translation from Arabic by Yusuf Ali, available at https://quranx.com/3.104.

[96] The Holy Quran, Verse 9:71 Al Tawba, {وَٱلْمُؤْمِنُونَ وَٱلْمُؤْمِنَٰتُ بَعْضُهُمْ أَوْلِيَآءُ بَعْضٍ ۚ يَأْمُرُونَ بِٱلْمَعْرُوفِ وَيَنْهَوْنَ عَنِ ٱلْمُنكَرِ}, translation from Arabic by Yusuf Ali, available at https://quranx.com/9.71.

[97] Al-Nawawi, Riyad as-Salihin, Book 1, Hadith 184, " من رأى منكم منكرًا فليغيره بيده ، فإن لم يستطع فبلسانه، فإن لم يستطع فبقلبه وذلك أضعف الإيمان" translation from Arabic by Sunnah.Com Website, available at https://sunnah.com/riyadussaliheen/1/184.

[98] Mashood A. Baderin, 'The Role of Islam in Human Rights and Development in the Muslim States', in Javaid Rehman and Susan Carolyn Breau (eds), *Religion, Human Rights and International Law: A Critical Examination of Islamic State Practices*, (Martinus Nijhoff Publishers, 2007) 330.

[99] The Holy Quran, Verse 5:2 Al Maida, {وَتَعَاوَنُواْ عَلَى ٱلْبِرِّ وَٱلتَّقْوَىٰ ۖ وَلَا تَعَاوَنُواْ عَلَى ٱلْإِثْمِ وَٱلْعُدْوَٰنِ} translation from Arabic by Sahih Intl, available at https://quranx.com/5.2

[100] Mashood A. Baderin, (n 98), 330.

[N]one of mankind can attain to complete welfare, either in this world or in the next, except by association (ijtima'), cooperation, and mutual aid. Their cooperation and mutual aid is for the purpose of acquiring things of benefit to them, and their mutual aid is also for the purpose of warding off things injurious to them. For this reason, it is said that "Man is a political being by nature.[101]

Accordingly, the principle of *Al-Hisbah* was found and exercised under the Islamic law in accordance with the principle "enjoining good and forbidding wrong".[102] In addition, it is supported by the principle of cooperation in goodness and devoutness.[103]

In practice, *Al-Hisbah* has been used in various ways according to the circumstances, particularly in the Kingdom of Saudi Arabia and Iran.[104] For instance, the exercise of *Al-Hisbah* in Saudi Arabia focuses on the application of the principle of enjoining good and forbidding wrong on most aspects of life within the society.[105] According to Saudi Royal Decree No. (M/37), Al-Hisbah`s task includes urging people not to cheat in selling, and prohibit the committing of any indecent acts in public places and referring the perpetrators of such acts to the Prosecution Authority.[106] However, Al-Hisbah has not been used in the context of prosecuting the perpetrators of crimes.[107] Indeed, the person who exercises *Al-Hisbah*'s task is not considered as a private prosecutor as is known in some legal system.[108] Due to the fact that *Al-Hisbah*'s allows the individuals in the community to take legal action by informing the prosecution authorities in the event of a crime and any violation that affects society and its

[101] Ann K. S.Lambton, *State and Government in Medieval Islam: An Introduction to the Study of Islamic Political Theory: The Jurists*, (Oxford: Oxford University Press, 1981). 146.
[102] Michael Cook, (n 88), 14-17.
[103] Ann K. S.Lambton, (n 101), 146. See also Mashood A. Baderin, (n 98), 330.
[104] Lorenzo Vidino, (n 89).
[105] Gregory Mack, *The Modern Muḥtasib: Religious Policing in the Kingdom of Saudi Arabia*, (PhD Thesis McGill University, 2012). 105.
[106] Saudi Royal Decree No. (M/37) of 10/26/1400H (corresponding to September 5, 1980)
[107] Michael Cook, (n 5) 22-25.
[108] See The German Code of Criminal Procedure in the version published on 7 April 1987 (Federal Law Gazette I page 1074, 1319), as last amended by Article 3 of the Act of 21 June 2002 (Federal Law Gazette I page 2144), Section 374 (1). See also The Swedish Code of Judicial Procedure, Ch. 20, Section. 8, (Rättegångsbalken 1942, 740). Isabella Okagbue, 'Private Prosecution in Nigeria: Recent Developments and Some Proposals', (1990) 34 Journal of African law 53, 53-54. The private prosecution is an individual private citizen who initiates a criminal proceeding instead of a public prosecutor who is the representative of the state.

principles. Thus, the public prosecutor is the only one who conducts the necessary investigations and refer the case to the judiciary.[109]

Furthermore, Al-Hisbah has not been linked to exercise universal criminal jurisdiction over international crimes. It is worth mentioning that unlike UJ, *Al-Hisbah* is practiced by individuals on behalf of the society, while UJ is exercised by States on behalf of the international community. In addition, *Al-Hisbah* is often restricted to economic, social and moral matters, and does not extend to criminal jurisdiction because it is a power vested in a state only.[110] Accordingly, it is not possible to rely on *al-Hisbah* to say that Islamic law recognises the principle of UJ. However, it does embody the principle of "enjoining good and forbidding wrong" and the principle of cooperation in goodness and devoutness, which may justify the acceptance of UJ into the Islamic law.[111] This is because international crimes are amongst the most serious crimes that threaten societies. Additionally, the exercising of UJ could be considered to be a manifestation of "enjoining good and forbidding wrong".[112] Equally, UJ could be said to be supported by the principle of cooperation in goodness and devoutness. As Mashood Baderin argued that "the principle of cooperation in goodness and devoutness can serve as a motivating factor for such international cooperation in Muslim States.".[113]

Although Islamic law has not used the terminology of war crimes, the crime of genocide or crimes against humanity, the criminal acts that involving in these crimes are criminalised directly under Islamic law.[114] For example Islamic law forbids the killing of civilians during wars; in this matter the *Sunnah* states "Do not kill a decrepit old man, or a young infant, or a child, or a woman"[115] Consequently, the exercise of UJ over such crimes could be considered a form of forbidding wrong and cooperation in goodness under Islamic Law.

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[109] Saudi System of Legal Procedures, Royal Decree No. (M / 1) of 1/22/1435H, (corresponding to 11/25/2013) Art 4.
[110] Gregory Mack, (n 89).
[111] Michael Cook, (n 5) 97-110.
[112] Sheikh al-Zuhili, (n 81), 271-274.
[113] Mashood A. Baderin, (n 98), 330.
[114] Hossam ElDeeb, (n 84), 207. See also M. Cherif Bassiouni (ed), *The Islamic Criminal Justice System,* (1st edn, Oceana Publications 1982), 203.
[115] Jihad (Kitab Al-Jihad) Book 15, (937), "لاَ تَقْتُلُوا شَيْخًا فَانِيًا وَلاَ طِفْلاً وَلاَ صَغِيرًا وَلاَ امْرَأَةً" translation from Arabic by Sunnah.Com Website, https://sunnah.com/abudawud/15/138.

Furthermore, most of Islamic countries are party to the international conventions that prohibit international crimes and require State parties to prosecute or extradite anyone accused of committing these crimes.[116] It is worth mentioning that Islamic law obliges the implementation of all contracts and agreements. In this regard, the *Holy Quran* states "O ye who believe! Fulfil your indentures".[117] Accordingly, there is an obligation on the governments to prosecute those accused of committing such crimes.[118]

Further, most Islamic countries have ratified the international conventions that criminalize international crimes.[119] For example, Pakistan and Iran are party to the Genocide Convention and the four Geneva Conventions,[120] and Saudi Arabia has ratified these conventions and the two Additional Protocols.[121]

Further, twenty four Islamic countries that have ratified the Rome Statute, which is 20% of the member states of the ICC.[122] In addition, it was noted at the Rome conference that Islamic countries did not suggest that Islamic law is incompatible with the Rome Statute,[123] which might suggest that the most serious international crimes are also criminalised under Islamic law.

Consequently, it can be argued that the principle of UJ is not contrary to Islamic law but rather may be supported by it since it aims to prosecute perpetrators of criminal acts.[124] To illustrate

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[116] Ahmad E. Nassar, (n 74), 590.

[117] The Holy Quran, Verse 5:1 Al Maida, {يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُوٓاْ أَوۡفُواْ بِٱلۡعُقُودِ} translation from Arabic by Sahih Intl, available at https://quranx.com/5.1

[118] Ahmad E. Nassar, (n 74), 592. See also Farhad Malekian, (n 90), 91-92.

[119] Yassin El-Ayouty, 'International Terrorism under the Law', (1999) 5 Journal of International & Comparative Law 485, 491.

[120] United Nations Publications, States parties to the Genocide Convention, Available at <https://web.archive.org/web/20121020233944/http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATYmtdsg_no=IV-1&chapter=4&lang=en> (accessed on 28/10/2018). See also International Committee of the Red Cross, State Parties to the Following International Humanitarian Law and Other Related Treaties as of 5-May-2011, Iran see pp 3. Pakistan see pp 5. Available at <https://www.icrc.org/eng/assets/files/other/ihl_and_other_related_treaties.pdf> (accessed on 28/10/2018)

[121] Ibid, Saudi Arabia see pp 5.

[122] Shaheen Sardar Ali and Satwant Kaur Heer, 'What is the Measure of 'Universality'? Critical Reflections on 'Islamic' Criminal Law and Muslim State Practice vis-à-vis the Rome Statute and the International Criminal Court' , in Tallyn Gray, *Islam and International Criminal Law and Justice*, (Torkel Opsahl Academic EPublisher Brussels, 2018) 186. See also ICC website, The States Parties to the Rome Statute.

[123] Ibid, 176 and 189.

[124] Ahmad E. Nassar, (n 74), 592. See also Yassin El-Ayouty, (n 119), 491.

this, it is useful now to discuss the position of certain Islamic countries on UJ, some of which have adopted UJ into their national legislation.[125]

For example, the Iraqi constitution stipulates in its second article that Islam is the official religion of the state, and is the basis for the legislation and therefore may not be enacted a law contrary to the provisions of Islam.[126] Regarding UJ, Iraqi law has authorized the exercise of UJ over war crimes under Penal Code No 111 of 1969 (amended to 14 May 2010), as well as the statute of the Iraqi special tribunal 2005.[127] Article 1 (2) of the statute of the Iraqi special tribunal 2005 and article 10 of the Penal Code authorise UJ over the perpetrators of international crimes, including war crimes and crimes against humanity.[128] Given the status of Islamic law in the Iraqi constitution, it can be inferred that UJ does not contradict Islamic law.

On the other hand, some Muslim countries although have not yet adopted UJ in their national legislation. Though they believe that UJ is not contrary to Islamic law in principle, but that it is a good way to combat impunity. For example, Saudi Arabia and Iran stated explicitly that UJ is recognised as an important principle to fight against the impunity.[129] However, they have criticised the misuse of UJ. For instance, Iran criticised the violation of the principle of diplomatic immunity and the exercise of UJ over the holder of this immunity.[130] In addition,

[125] e.g, The State of Qatar, see Observations by Qatar on the scope and application of the principle of universal jurisdiction at the 66th session (2011). A/66/93 - Full texts of replies, available at <http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Qatar.pdf> (accessed 20/7/2018). See also Report of the Secretary-General, on The scope and application of the principle of universal jurisdiction Sixty-sixth session, United Nations A/66/93 General Assembly 20 June 2011, par 30, p 7. Available at <https://undocs.org/A/66/93> (accessed 20/7/2018).

[126] Constitution of the Republic of Iraq [Iraq], 15 October 2005, art 2, available at: https://www.refworld.org/docid/454f50804.html [accessed 19 August 2019]

[127] Iraq: Penal Code [Iraq], No. 111 of 1969, July 1969, available at: https://www.refworld.org/docid/452524304.html [accessed 19 August 2019]. See also National Legislative Bodies / National Authorities, Iraq: Statute of the Special Tribunal for Human Rights, 10 December 2003, available at: https://www.refworld.org/docid/404c7d8c3.html [accessed 19 August 2019]

[128] Amnesty International, 'Universal Jurisdiction Preliminary Survey of Legislation around the World – 2012 Update', Index: IOR 53/019/2012, October 2012, at 64-65.

[129] Sixth Committee of the UN, Tackling Scope, Application of Universal Jurisdiction, Sixth Committee Speakers Debate Best Venue for Further Discussions on Principle's Definition, Seventy-Second Session, 13th Meeting (Am) On 11 October 2017, GA/L/3549 available at <https://www.un.org/press/en/2017/gal3549.doc.htm> (Accessed 2/11/2018). See also Mansour Farrokhi, 'The Application of Universal Jurisdiction in Iranian Criminal Law', (2015) 6 International Journal of Business and Social Science 93, 94-95.

[130] Sixth Committee of the UN, Universal Jurisdiction Principle Must Be Defined to Avoid Abuse, Endangerment of International Law, Sixth Committee Hears as Debate Begins, Sixty-Ninth Session, 11th & 12th Meetings (Am & Pm) On 15 October 2014, GA/L/3481, available at <https://www.un.org/press/en/2014/gal3481.doc.htm> (Accessed 30/10/2018).

Saudi Arabia criticised the absence of international legal standards for regulating the exercising of UJ.[131] Saudi Arabia argued that this issue would lead to the misuse of UJ and the violation of international legal principles such as State sovereignty.[132] Accordingly, neither Saudi Arabia nor Iran, object to UJ on the grounds that it is contrary to Islamic law. Thus, it can be argued that the principle of UJ *per se* does not conflict with Islamic law, rather it is an accepted principle under Islamic law to combat impunity. Instead, the problem regards the misuse of UJ and the lack of international standards that define the scope of its application.[133]

In general, it can be concluded that the application of the principle of *Al-Hisbah* does not extend to the recognition of the exercise of UJ. However, the principles of "enjoining good and forbidding wrong" and "cooperation in goodness and devoutness" can be regarded by analogy as the legal basis for UJ under the Islamic law. In fact, the above-mentioned principles are also considered the legal basis of the *Al-Hisbah* itself. Consequently, the exercising of UJ to combat impunity does not contradict provisions of Islamic law. This is because the international crimes that are subject to UJ are also criminalised by Islamic law. Thus, the exercise of UJ can be considered to be a manifestation of the Islamic principles of "enjoining good forbidding wrong" and "cooperation in goodness and devoutness".[134]

2.3: Historical development of UJ in International law

This section addresses the legal development of UJ in international law, its origins in international customary law and then its recognition implicitly in several international treaties and Conventions. In addition, it highlights the importance of the Lotus Case to understanding the development of extraterritorial Jurisdiction without traditional links. Finally, the research will discuss the significant increase in the use of UJ since the end of the 1990s.

[131] Sixth Committee of the UN, (n 129).
[132] Ibid.
[133] Ibid.
[134] Farhad Malekian, (n 90), 129.

2.3.1: The Emergence of UJ under International Law

Piracy is considered by many scholars to be the historical basis of UJ under international customary law,[135] and the emergence of UJ under customary international law that exercised by national criminal courts has been linked to piracy on the high seas.[136] This is due to the fact that the crime scene for this offense is usually the high seas,[137] which is not subject to any territorial sovereignty.[138] Hence, piracy is often committed outside the territory of a State, which make it impossible to exercise any national jurisdiction.[139] In addition, pirate ships often do not raise the flag of a state, making them devoid of any nationality.[140] Accordingly, as a result of the absence of territorial or nationality principles, national jurisdiction will not be a hindrance to the of exercising of UJs to prosecute the perpetrators of piracy on the high seas.[141]

Consequently, it has been argued that customary international jurisdiction for piracy in the high seas has served to justify the exercise of UJ over certain crimes that act against the interests of the entire international community, such as the slave trade or war crimes.[142] Therefore, the supporters of UJ have depended strongly on piracy as the historical precedent for UJ.[143] However, some authors have questioned the positioning of piracy as a basis for justifying UJ.[144] In this regard, it was argued that "there has always been debate among legal scholars about the nature of the crime and how it gave rise to universal jurisdiction. This debate is nowadays very relevant to understanding the historical weaknesses of relying on

[135] Dan Jerker B. Svantesson, 'A New Jurisprudential Framework for Jurisdiction: Beyond the Harvard Draft', (2015) 109 American Journal of International Law Unbound 69. See also, Mahmoud Cherif Bassiouni, (n 1), 108; Kenneth C. Randall, (n 63), 793; Tamsin Paige, 'Piracy and Universal Jurisdiction', (2013) 12 Macquarie Law Journal 131, 134.
[136] Ibid. See also Harry Gould, (n 1), 84.
[137] Malcolm N Shaw, (n 1), 609.
[138] Kenneth C. Randall, (n 63), 791.
[139] International Law Association, Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences, prepared by the Committee on International Human Rights Law and Practice, submitted to (London Conference, 2000) 3. See also Willard B. Cowles, 'Universal Jurisdiction over War Crimes', (1945) 33 California Law Review 177, 180.
[140] Tamsin Paige, (n 135), 135.
[141] Malcolm N Shaw, (n 1), 611.
[142] Aaron X. Fellmeth and Maurice Horwitz. (n 38), 68. "Crimen contra omnes. krē´mān kōn´tra ōm´nās. krī´men kan´tru am´nēz. n. "Crime against all." A crime against humanity as a whole, such as piracy, slavery, genocide, or terrorism".
[143] Tamsin Paige, (n 135), 135.
[144] Yana Shy Kraytman, (n 22), 103.

piracy for justification of modern universal jurisdiction".[145] This issue is examined in detail in the following chapter.

Having established the role of piracy as a starting point for the exercise of UJ under customary international law,[146] this section highlights the legal evolution of UJ under customary international law and its impact on the exercise of UJ. In this matter, there is prevailing view under customary international law that states are entitled to exercise UJ over certain international crimes.[147] Furthermore, it is commonly accepted that the exercise of UJ has been legalised under customary international law with regard to offenses considered especially heinous by the international worldwide, for instance, war crimes, genocide, and crimes against humanity.[148] In fact, the international community expanded the scope of UJ during the World War II to include the most serious criminal acts such as war crimes and genocide.[149] Consequently, many states have stressed that they have an international obligation to fight against impunity for the most serious international crimes by exercising UJ.[150]

As well as this obligation, the legal basis for the recognition of UJ under customary international law is pragmatic in as much as it involves states practice of UJ.[151] It is worth mentioning that the research in the fourth chapter will discuss the validity of considering the customary international law as a legal basis for UJ.

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[145] Petra Baumruk, *The Still evolving Principle of Universal Jurisdiction*, (PhD Thesis Charles University in Prague, 2015) 45.

[146] Dan Jerker B. Svantesson, (n 135), 69.

[147] Pavel Caban, 'Universal Jurisdiction Under Customary International Law, International Conventions and Criminal Law of the Czech Republic: Comments', (2013) 4 Czech Yearbook of Public & Private International Law 173, 178.

[148] Report of the UN Secretary-General, The Scope and Application of the Principle of Universal Jurisdiction, Sixty-fifth session, UN. Doc. No A/65/181 (29 July 2010), See also Roger O'Keefe, 'The Grave Breaches Regime and Universal Jurisdiction', (2009) 7 Journal of International Criminal Justice 811, 814; Michael P. Scharf, 'Universal Jurisdiction and the Crime of Aggression', (2012) 53 Harvard International Law Journal, 366.

[149] Yana Shy Kraytman, (n 22), 123. see also Robert Cryer, *Prosecuting International Crimes Selectivity and the International Criminal Law Regime*, (1st edn, Cambridge University Press 2005) 30-36.

[150] Amnesty International, (n 128) 1-2. See also ZHU Lijiang, 'Universal Jurisdiction Before the United Nations General Assembly: Seeking Common Understanding under International Law', in Morten Bergsmo and Ling Yan (eds), *State Sovereignty and International Criminal Law*, (Beijing: Torkel Opsahl Academic EPublisher, 2012) 217; Dalila Hoover, 'Universal jurisdiction not so universal: time to delegate to the International Criminal Court?', (2011) 8 Eyes on the International Criminal 73, 87.

[151] Nicolaos Strapatsas, 'Universal jurisdiction and the International Criminal Court', (2002) 29 Manitoba Law Journal 1, 11. See also, Gabriel Bottini, (n 67), 510; Mahmoud Cherif Bassiouni, (n 1), 96-97.

The question that arises is how a customary rule that permits the exercise of UJ over war crimes, crimes against humanity and genocide has emerged in such a rapid manner? Usually, the customary rule requires a period of time to develop and settle, which may extend to decades.[152] However, it was mentioned that the emergence of the customary rule rapidly is not an impediment to its existence.[153] In this matter, the ICJ affirmed that ''[a]lthough the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law ...''[154] Thus, sometimes customary international norms could arise more rapidly than usual. Indeed, this rapid expansion of the scope of UJ under customary international law could be attributed to the notion of ''Grotian Moment''[155] or ''constitutional moment for international law.''[156] In this regard, it was argued that this moment is a pivotal moment in international law where a customary rule arises and evolves more rapidly than usual in response to significant changes in the international community.[157] This moment happens usually during a time of significant change in the world, such as, the outbreak of the two world wars and the scale of their losses which is unprecedented in the history of mankind.[158]

In fact, the term of "Grotian moment" was coined in 1985 by Professor Richard Falk to refer to a transformative development in which new doctrines and rules of customary international law appear with extraordinary speed.[159] This moment was described by some scholars as the constitutional moment for international law.[160] Usually, this occurs during a period of significant change in world history, similar to that happened in in Grotius's times at the end of European feudalism, when new institutions, procedures and standards had to be

[152] Michael P. Scharf, *Customary International Law in Times of Fundamental Change Recognizing Grotian Moments*, (1edn, Cambridge University Press, 2013) 7.
[153] Ibid, 5.
[154] North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. the Netherlands), Judgment of 20 February 1969 (1969) ICJ Rep 3, pp. 29, para74, see also para 71-73.
[155] Michael P. Scharf, (n 152) 4.
[156] Leila Nadya Sadat, 'Enemy Combatants after Hamdan v. Rumsfeld: Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror', (2007)75 The George Washington Law Review 1200, 1206; Bardo Fassbender, The United Nations Charter as Constitution of the International Community, (1998) 36 The Columbia journal of transnational law 529.
[157] Michael P. Scharf, (n 152), 6-7.
[158] Ibid.
[159] Ibid, 4-5; Richard A. Falk, Friedrich Kratochwil and Saul H. Mendlovitz, International Law: A Contemporary Perspective, (1st end Boulder, Westview Press, 1985) 7.
[160] Leila Nadya Sadat, (n 156), 1206. Bardo Fassbender, (n 156) 529; Jenny S. Martinez, 'Towards an International Judicial System', (2003) 56 Stanford law review 429, 463.

established to deal with the decline of the Church at that time and the rise of the secular states.[161]

Regarding UJ, it was mentioned that since the beginning of the twentieth century, the international community has witnessed a development in the understanding and the exercise of UJ.[162] The scope of UJ has been expanded since the World War II to include the most serious criminal acts such as war crimes and genocide following the killing of millions of people in that war and wars that preceded it.[163] Consequently, it can be argued that the second world war period was Grotian moment that led to the expansion in the scope of UJ to include the most serious crimes, which caused the death of millions of people in the war.

Notwithstanding of the above argument, many scholars have classified UJ into two ways: a UJ based on customary international law as a legal source for its legitimacy, and a UJ based on written international law, which is enshrined in international treaties and conventions.[164] In this regard, Pavel first described the two categories of UJ by terms that indicate their legal source. Firstly, customary UJ, which is exercised on behalf of international community as a whole over certain crimes, regardless of the absence of traditional links of jurisdiction. Pavel argued that the restrictions on the practice of customary UJ are imprecise meaning that UJ in absentia can be invoked under international customary law.[165] However, this view can be criticized for that there is no legal basis to support UJ in absentia under customary international law because most states require the presence of the accused in their territory.[166]

Secondly, contractual UJ is based on treaties that apply only to member states.[167] It is worth mentioning that the contractual provisions are supposed to not create legal obligations for non-state parties.[168] Due to this in accordance with Article 34 of the Vienna Convention on the Law of the Treaties, third party states should not be a subject to any obligations resulting from the treaty,[169] Accordingly, Caban argued that contractual UJ is supposed to be restricted

[161] Michael P. Scharf, (n 152) 5.
[162] Claus Kreb, (n 1) 576.
[163] Ibid. See also Yana Shy Kraytman, (n 22), 103.
[164] Fannie Lafontaine, 'Universal Jurisdiction the Realistic Utopia', (2012) 10 Journal of International Criminal Justice 1277, 1285; Pavel Caban, (n 147), 185.
[165] Ibid.
[166] Ibid.
[167] Ibid.
[168] Gabriel Bottini, (n 67), 521.
[169] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, art 34.

and bound by the provisions of the convention or treaty that has established and approved the exercise of UJ.[170] Hence, it is clear that the difference between the legal source of UJ will affect which State may exercise UJ and the legal conditions pertaining to its use.

This view can be criticized because Article 34 affirms that the third party states could be a subject to obligations resulting from the treaty,[171] if the provisions of the treaty are deemed to be peremptory norms of international law, in which case its provisions will be applied to the entire international community.[172] Regarding UJ, there is no international convention that comprehensively governs the principle of UJ.[173] However, the permissibility of exercising UJ is implicit in international conventions.[174] In fact, many international conventions have recognized the principle of UJ implicitly.[175] For instance, the four Geneva Conventions of 1949 implicitly provide the notion of UJ over grave breaches of those Conventions,[176] and Article 5(2) of the Convention against Torture.[177] In this matter, it was argued that the recognition of the principle of *aut dedere aut judicare* includes implicit recognition for the principle of UJ.[178]

On the other hand, it was observed that the common factor among international crimes that are subject to UJ is that such crimes constitute a violation of *jus cogens*.[179] As mentioned above, the provisions of international conventions if deemed to be a peremptory norm of international law, will be applied to the entire international community.[180] Accordingly, the principle of *aut dedere aut judicare* permit custodial states

[170] Pavel Caban, (n 147), 190.
[171] Vienna Convention on the Law of Treaties, (n 169) art 34.
[172] Ibid. See also William A. Schabas, Convention for the Prevention and Punishment of the Crime of Genocide, United Nations, 2008 United Nations Audio-visual Library of International Law, available at http://legal.un.org/avl/ha/cppcg/cppcg.html (Accessed 20/8/2018).
[173] Claus Kreb, (n 1) 571.
[174] Malcolm N Shaw, (n 1), 668.
[175] Yearbook of the ILC 1996, vol. II (Part Two). Doc. No. A/CN 4/SER A/1996/Add1, 28. See also Harmen van der Wilt, (n 39), 239-240.
[176] See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31, Art. 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85, Art. 50; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135, Art. 129; , Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, Art. 146.
[177] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85. Art 5(2).
[178] Mahmoud Cherif Bassiouni, (n 1), 152.
[179] these crimes involve piracy, slavery, war crimes, genocide, crimes against humanity and torture
[180] Vienna Convention on the Law of Treaties, (n 169) art 53. See also Mahmoud Cherif Bassiouni, (n 1),119; William A. Schabas, (n 164).

to either exercise criminal jurisdiction based on traditional links of jurisdiction,[181] or exercise UJ if the accused is present in the territory of the state.[182] The second option is to extradite the accused of crimes to a capable state that willing to exercise the criminal jurisdiction.[183] It is clear that the principle of *aut dedere aut judicare* supports the exercise of UJ as the legal basis for the criminal jurisdiction when crime amounts to a *jus cogens* violation.[184]

Regardless of Pavel's classification, it has been argued that "in principle, no reason why universal jurisdiction cannot be created by treaty as well as by customary law".[185] Indeed, there is no dispute between customary UJ and contractual UJ. Rather, the difference between their sources is a sign of legal evolution. As with many international rules that originate in customary international law and then become codified in an international treaty, universal jurisdiction derives its legitimacy from both sources. In this matter, the International Law Commission (ILC) argued that "it is generally recognized that treaties may codify, crystallize or generate rules of customary international law. The point was also made that a rule of customary international law may operate in parallel to an identical treaty provision".[186]

In light of the above analysis, it can be argued that customary and contractual UJ are complementary. On the other hand, it is clear that the legal elements for exercising UJ under customary international law are not clear or precise. It is arguable that the international community should work to solve this issue. Thus, in the sixth chapter the ability of the ILC to deal with this issue by formulating draft articles through their role in codifying the provisions of international law will be examined.

[181] Petra Baumruk, (n 145), 21. See also Anthony J. Colangelo, 'The Legal Limits of Universal Jurisdiction', (2006) 47 Virginia journal of international law 149, 150.
[182] Ibid, 49.
[183] Malcolm N Shaw, (n 1), 671-674. See also Paul Donovan Arnell, *International Jurisdiction and Crime: A Substantive and Contextual Examination of Jurisdiction in International Law*, (PhD Thesis University of Hull, 1998) 78.
[184] Pavel Caban, (n 147), 185; Fannie Lafontaine, (n 164), 1285. See also Christian Tomuschat and Jean-Marc Thouvenin eds, (n 53), 269.
[185] Gabriel Bottini, (n 67), 521.
[186] Report of the International Law Commission, 65th session, 2013, A/68/10, Chapter VII Formation and Evidence of Customary International Law, par 80. p 66.

2.3.2. UJ Categories

This sub-section briefly discusses the varieties of UJ in order to highlight some issues that are analysed later. The first is classification based on historical development, which will help to develop a wider understanding of the difference between the crimes that could be subject to this jurisdiction. The second is classification based on the limits and scope of exercising UJ, which will help to explore the reasons behind the absolute and restricted practice of this jurisdiction.

2.3.2.1. Classification of UJ Based on its Historical Development:

Since the beginning of the twentieth century, the international community has witnessed a development in the understanding and the exercise of UJ. The exercise of this jurisdiction had historically been limited to the crime of maritime piracy.[187] However, as mentioned above, the international community expanded the scope of UJ at the end of World War II to include the most serious criminal acts such as war crimes and genocide, which had caused the death of millions of people in that war and wars that preceded it.[188] Accordingly, some scholars classify UJ into two ways.[189]

Firstly, traditional, or classic UJ, which has been recognized and historically exercised over the crime of piracy. In fact, there is virtually international consensus on the permissibility of exercising UJ over the crime of piracy because there is no legal or practical disagreement on this matter.[190] Hence, it has been argued that piracy is the foundation of modern UJ,[191] and the basic rule of UJ.[192] in this matter Kontorovich explained that jurisdiction over piracy was used to support and legitimize modern UJ.[193] However, it was argued that piracy cannot be considered an international crime because it lacks the seriousness of other international

[187] Kenneth C. Randall, (n 63), 792.
[188] Yana Shy Kraytman, (n 22), 121.
[189] Eugene Kontorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation', (2004) 45 Harvard International Law Journal 183, 188. See also Petra Baumruk, (n 145), 97.
[190] International Law Association (n 139) 3. See also Willard B. Cowles, (n 139), 180.
[191] Eugene Kontorovich, (n 189) 100.
[192] Malcolm N Shaw (n 1), 611. See also Dan Jerker B. Svantesson, (n 135), 69.
[193] Eugene Kontorovich, (n 189) 188.

crimes such as war crimes,[194] and other international crimes.[195] As mentioned above, this issue will be discussed in the following chapters.

Secondly, modern UJ has been recognised since the early 20th century.[196] Modern jurisdiction is essentially the extension of traditional UJ to include the most serious crimes in the international community.[197] It worth mentioning that the modern UJ, unlike its predecessor, remains controversial despite the international recognition of its existence.[198] The legal controversy concerns its definition, and the scope of its practice, and the crimes that are subject to this jurisdiction.[199] The above issues cannot satisfy the legal certainty required by criminal law.[200] Hence, the following chapter considers what crimes should be subject to UJ.

2.3.2.2. Classification of UJ Based on Limitations of Its Exercise

2.3.2.2.1: Absolute UJ: 'UJ in Absentia'.

Absolute or "pure"[201] UJ means the exercise of UJ that does not require any link between the crime, accused and the forum state.[202] Accordingly, states could exercise UJ over the accused regardless of the existence of whether the perpetrator is in their territory or not.[203] In this matter, UJ *in absentia* was defined "as the conducting of an investigation, the issuing of an arrest warrant, and/or the bringing of criminal charges based on the principle of universal jurisdiction when the defendant is not present in the territory of the acting state".[204]

In fact, UJ *in absentia* is unbounded because it allows a state to prosecute the accused persons regardless of any traditional nexus, including whether the accused is in the custody of the forum state or not. A few states have exercised UJ *in absentia* within their criminal codes.

[194] Ibid, 191.
[195] Ibid.
[196] Ibid, 196.
[197] Aaron X. Fellmeth and Maurice Horwitz. (n 38) 68. "Crimen contra omnes. krē´mān kōn´tra ōm´nās. krī´men kan´tru am´nēz. n. "Crime against all." A crime against humanity as a whole, such as piracy, slavery, genocide, or terrorism".
[198] Petra Baumruk, (n 145), 100.
[199] Robert Cryer, (n 149), 75.
[200] Luc Reydams, The application of universal jurisdiction in the fight against impunity, 2016 the European Parliament's Policy Department, Directorate-General for External Policies, QA-01-16-324-EN-N (pdf), 6.
[201] Mark A. Summers, 'The International Court of Justice's Decision in Congo V. Belgium: How Has It Affected the Development Of A Principle Of Universal Jurisdiction That Would Obligate All States To Prosecute War Criminals?', (2003) 21 Boston University International Law Journal 64, 67-70.
[202] Fannie Lafontaine, (n 164), 1283. See also Petra Baumruk, (n 145), 67.
[203] Paola Gaeta, (n 3), 905-906.
[204] Petra Baumruk, (n 145), 67.

Belgium and Spain are the most significant examples. Both states recognised and exercised absolute UJ before their laws were amended to limit such wide exercise.[205]

It should be noted that there is no legal basis that supports the legality of UJ *in absentia*. It has been argued that customary international law has not allowed UJ *in absentia* because the lack of the states' practice[206] as most states do not allow UJ in absentia.[207] Additionally, there is no legal provision under conventional international law allows UJ in absentia.[208]

Accordingly, UJ *in absentia* has been subject to legal criticism. For example, Judge Guillaume said that "[u]niversal jurisdiction in absentia as applied in the present case is unknown to international law".[209] Additionally, Pavel Caban argued that "[a]s result, according to some current voices, universal jurisdiction might seem to be "on its last legs, if not already in its death throes", or it has even already turned out to be only a "self-feeding hype" and "legal lore" generated by NGOs, activist lawyers and academia and fraught with circular arguments and flawed analogies".[210] This issue will be discussed critically in the following chapters in order to identify the most pragmatic factors that led to the reduction of the exercise of absolute UJ.[211]

2.3.2.2.2: Conditional UJ: 'UJ with Presence'

Conditional UJ is the exercise of pure UJ with some restrictions, such as requiring the presence of the accused in the territory of the state that wishes to exercise UJ.[212] The concept of absolute UJ had been subject to political pressure and legal criticism.[213] Such as when Judge van den Wyngaert highlighted in his opinion ''A practical consideration may be the difficulty in obtaining the evidence in trials of extraterritorial crimes. Another practical reason may be

[205] Olympia Bekou and Robert Cryer, 'The International Criminal Court and Universal Jurisdiction: A Close Encounter?', (2007) 56 International and Comparative Law Quarterly 49, 56.
[206] Fannie Lafontaine, (n 164), 1283.
[207] ZHU Lijiang, (n 150) 217.
[208] Mark A. Summers, (n 201), 67-70.
[209] Separate Opinion of President Guillaume, the Judgment of 14 February 2002, Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), International Court of Justice (ICJ), 14 February 2002. Available at http://www.icj-cij.org/files/case-related/121/121-20020214-JUD-01-01-EN.pdf.
[210] Pavel Caban, (n 147),175.
[211] Petra Baumruk, (n 145), 67.
[212] Paola Gaeta, (n 3), 905-506.
[213] Roger O'Keefe, (n 148), 812.

that States are afraid of overburdening their court system''[214] Accordingly, it is argued that several states are now adopting this conditional approach to the exercise of UJ.[215]

It worth mentioning that the above argument does not mean that the exercise of absolute UJ is not existed.[216] As Roger O'Keefe stated: "as a matter of international law, if universal jurisdiction is permissible, its exercise in absentia is logically permissible as well, as accepted by Judges Higgins, Kooijmans and Buergenthal and as elaborated on at length by Judge ad hoc Van den Wyngaert".[217] However, conditional UJ is less controversial, more realistic and effective[218] because UJ can have dangerous consequences, especially in the absence of generally accepted limitations on its scope.[219] Therefore, the practice of conditional or narrower UJ is a more acceptable.[220]

At the sixty-ninth session of the UN General Assembly, states seemed to favour the restrictive or conditional exercise of UJ.[221] Accordingly, many states that recognised the exercise of UJ require a connection between the forum state and the accused. In this context, the presence of the accused in the prosecuting state is considered to be the connection.[222] However, this kind of UJ has also not been escaped criticism because the limitation might restrain UJ to achieve its purpose to fight against the impunity.[223] This issue will be discussed further in the following chapters.

[214] Dissenting opinion of judge van den wyngaert, ICJ, para 44, Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v.Belgium), Judgment,Feb. 14, 2002),

[215] Rephael Ben-Ari, 'Universal jurisdiction: chronicle of a death foretold?', (2015) 43 Denver Journal of International Law and Policy 165, 170.

[216] Ariel Zemach, 'Reconciling Universal Jurisdiction with Equality Before the Law', (2011) 47 Texas International Law Journal 143, 150.

[217] Roger O'Keefe, (n 205), 830.

[218] Fannie Lafontaine, (n 164), 1283.

[219] Eugene Kontorovich, (n 189), 184.

[220] Petra Baumruk, (n 145), 66

[221] Report of the UN Secretary-General, The scope and application of the principle of universal jurisdiction, Sixty-ninth session, UN. Doc. No. A/69/174 (23 July 2014).

[222] Petra Baumruk, (n 145), 66

[223] Pavel Caban, (n 147), 175.

2.3.3: The Importance of the Lotus Case to Understanding the Recognition of UJ

Although, customary international law has recognised the principle of universality over the crime of piracy,[224] and many jurists since Hugo Grotius have recognised the permissibility of exercising UJ over certain international crimes, such as war crimes,[225] as noted above criminal jurisdiction prior to the Lotus case had been confined to the principles of territoriality and nationality, "classic criminal jurisdiction".[226] Thus, the judgment in the Lotus case was significant in the issue of exercising extraterritorial jurisdiction.[227]

Furthermore, it is considered a fundamental turning point in the jurisprudence of criminal jurisdiction due to the fact that contemporary international law recognizes more fully the possibility of exercising extraterritorial jurisdiction[228] since the Permanent Court of International Justice (PCIJ) delivered its judgment in a dispute between Turkey and France by accepting extraterritorial jurisdiction over crimes committed outside the borders of the state.[229] The judgment stressed that, in general, States are allowed under international law to extend the application of their law and jurisdiction unless there is a rule in international law preventing the extension of jurisdiction.[230]

In the case, the French ship Lotus collided with a Turkish ship on the high seas in 1926, causing the death of many Turkish citizens. The PCIJ held that Turkey had jurisdiction to prosecute the French naval lieutenant for criminal negligence, although the incident took place outside Turkish territory.[231] It is clear that the Court decided that Turkey did not breach international law when the Turkish national court exercised criminal jurisdiction over a crime committed outside Turkey by a French national. The Court held that:

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[224] Malcolm N Shaw, (n 1), 609. See also Tamsin Paige, (n 135), 135.
[225] Robert Cryer, (n 59) 54.
[226] Robert Cryer, (n 141), 75. See also Mari Takeuchi, *Modalities of the Exercise of Universal Jurisdiction in International Law*, (PhD Thesis University of Glasgow 2014) 30.
[227] Lotus Case, (n 2).
[228] Harmen van der Wilt, 'Universal Jurisdiction under attack: an assessment of African misgivings towards international criminal justice as administered by Western states', (2011) 9 Journal of International Criminal Justice 1043, 1049.
[229] Mahmoud Cherif Bassiouni, (n 1), 90-93.
[230] Yana Shy Kraytman, (n 22), 117.
[231] Claus Kreb, (n 1) 572.

> The rules of law binding upon States, therefore, emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these CO-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot, therefore, be presumed. Now the first and foremost restriction imposed by international law upon a State is that-failing the existence of a permissive rule to the contrary-it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention. It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law.[232]

Accordingly, it is clear that a State has the right to exercise its jurisdiction, as long as this does not conflict with the provisions of international or customary law.[233] However, it should be noted that the subject of the dispute before the Court did not address the principle of UJ, rather it dealt with the issue of exercising extraterritorial jurisdiction generally.[234] It is also worth mentioning that the Court issued its ruling before a notable increase in recognition of the principle of UJ, which came after the Second World War.[235] Therefore, the question arises here, can the Lotus case be used as a pretext to support the exercise of UJ?

In this matter, many scholars believe that the Lotus case has an important role to play in developing international recognition of UJ.[236] Further, the Lotus case has a significant role to play in the development of the exercising of UJ in a number of international conventions[237] due to fact that the Lotus case has authorized the exercise of extraterritorial jurisdiction and changed the traditional view on the exercising of criminal jurisdiction exclusively on the principles of territoriality and nationality.[238]

On the other hand, some members of the ICJ have challenged the Lotus decision. In this regard, Judges Bedjaoui and Shahabuddeen in the case of Legality of the Threat or Use of

[232] Lotus Case, (n 2). See also Harmen van der Wilt, (n 228), 1049; Ryan Rabinovitch, (n 14), 504.
[233] International Law Association, (n 139), 10.
[234] Charles Oluwarotimi Olubokun, *The Future of Prosecutions under the International Criminal Court*, (PhD Thesis Brunel University London, 2015) 41.
[235] Dalila Hoover, (n 150), 82
[236] Mahmoud Cherif Bassiouni, (n 1), 90-93
[237] International Law Association, (n 139), 10.
[238] Mari Takeuchi, (n 226), 16-22.

Nuclear Weapons expressed that the assumption of jurisdiction set out in the Lotus case is questionable in terms of its continued applicability in the context of globalization, international cooperation and an increasingly restricted perception of state sovereignty.[239]

Furthermore, Judge Guillaume discussed the Lotus decision in his individual opinion in Arrest Warrant of 11 April 2000 (Congo v. Belgium).[240] In this matter he highlighted that the decision in the Lotus case cannot be used as a pretext to support the exercise of UJ in absentia.[241] This is due to the absence of international rules supporting the exercise of UJ in absentia.[242] However, he claimed that according to the Lotus case decision, UJ in absentia can be exercised over piracy because it is accepted under customary international law,[243] and that all States have concurrent national jurisdiction over the crime of piracy as a crime committed outside the sovereign territory of any State.[244] On the other hand, he argued that UJ conditioned by the presence of the accused can be exercised over some international crimes, as provided for in a number of international conventions.[245]

In light of the above discussion, the judgment in the Lotus case allows states to exercise their jurisdiction, as long as it is compatible with the provisions of international law and customary international law.[246] Accordingly, the question that arises is whether UJ is allowed under international law. In this matter, customary international law has permitted the exercise of UJ over the crime of piracy. In addition, the permissibility of exercising UJ over the most serious international crimes is conditional on the presence of the accused in the territory of the state.[247] However, the exercising of UJ in absenti, or "absolute UJ", over other international crimes under international costmary law cannot be supported by the Lotus case because it is a controversial issue among jurists.[248] In addition, it is controversial under

[239] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996. See also Ryan Rabinovitch, (n 14), 504.
[240] Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), International Court of Justice (ICJ), 14 February 2002, pp 70, [hereinafter Arrest Warrant Case]
[241] Ibid.
[242] Separate Opinion of President Guillaume, (n 209).
[243] Ryan Rabinovitch, (n 14), 504.
[244] Tamsin Paige, (n 135), 151.
[245] Mari Takeuchi, (n 226), 16-22.
[246] Harmen van der Wilt, (n 228), 1049-1050.
[247] Rephael Ben-Ari, (n 215), 170.
[248] Florian Jessberger, Wolfgang Kaleck and Andreas Schueller, 'Concurring Criminal Jurisdictions under International Law', in Morten Bergsmo (ed), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes*, (Oslo: Torkel Opsahl Academic Publisher, 2010) 236.

customary international law, due to the fact that the practice of UJ in absentia has been criticised, which has led all states to require the presence of the accused in their territory to practice UJ.[249] Hence, there is no state practice that supports the existence of absolute UJ under customary international law.

Based on this analysis, it can be argued that the Lotus case is important in justifying the exercise of UJ, although it was not addressed directly, because the court authorised the exercising of extraterritorial jurisdiction as long as international law permits that practice.[250] Regarding UJ, it is permitted under customary international law to exercise UJ over the crime of piracy. In addition, it is permitted under customary international law to exercise UJ over the most serious international crimes when accused is presence in the territory of the state.[251] By contrast, the exercising of UJ in absentia under customary international law is somewhat ambiguous and requires clarification. Thus, this issue will be discussed in the following chapters.

2.3.4: The Increase in the Exercise of UJ since the End of the 1990s

Most literature on the subject of UJ discusses that Eichmann case, which was the first time a national court exercised of UJ following the Second World War. [252] It is worth mentioning that the case of Eichmann, despite its importance in the development of UJ, has been the subject of debate among jurists of international law.[253] Following the Eichmann's trial in 1961 the practice of UJ over international crimes such as war crimes and genocide has gone through a period of inactivity spanning nearly four decades, from Eichmann's trial in 1961 to the Pinochet case in 1998.[254] It is worth noting that during that period the international community almost did not witness any practice of UJ except for the John Demjanjuk case in

[249] Pavel Caban, (n 147), 185; Fannie Lafontaine, (n 164), 1285.
[250] Florian Jessberger, (n 248), 236
[251] Rephael Ben-Ari, (n 215), 170.
[252] William A. Schabas, 'The contribution of the Eichmann Trial to International Law', (2013) 26 Leiden Journal of International Law 667, 691.
[253] Attorney-General of Israel v Adolf Eichmann (District Court, Jerusalem) Case No. 40/61, 15 January 1961, 36 ILR 5. Attorney-General of Israel v Adolf Eichmann (Supreme Court of Israel) Case No. 336/61, 29 May 1962, 36 ILR. See also Leora Bilsky, 'The Eichmann Trial and the Legacy of jurisdiction', in Seyla Benhabib (eds), *Politics in Dark Times: Encounters with Hannah Arendt*, (1st edn, New York: Cambridge University Press, 2010) 199.
[254] Ibid; R. v. Bow St. Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 1), 3 WLR 1456 (H.L.(E.) 1998); R. v. Bow St. Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3), 2 WLR 827 (H.L.(E.) 1999) [hereinafter, Pinochet Case]**;** Mahmoud Cherif Bassiouni, (n 1), 87.

1983, which was somewhat similar to the Eichmann case. Here, Demjanjuk was accused of genocide and crimes against humanity against Jews during World War II.[255]

However, in the late 1990s and early 2000s, international criminal law witnessed a remarkable development as a number of international tribunals and courts were established and a large number of countries adopted UJ as a means of combating impunity for the most serious international crimes.[256] As explored in the fourth chapter, the adoption of UJ in national legislation has increased significantly since the late 1990s and early 2000s. A significant number of states have included UJ in their legal system since that time, the reason for this could be attributed to the increase in international awareness of the need to combat the phenomenon of impunity, especially after the establishment of a number of international courts including the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the ICC.[257] The Preamble of the ICC notes that it is "[a]ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation".[258] It is worth mentioning that there is no provision under the statute of the ICTY, ICTR and ICC that allows the exercise of jurisdiction. However, the establishment of the aforementioned courts has played a prominent role in encouraging states to adopt the exercising of UJ into their national legal system.

The international awareness of the need to combat impunity was reflected in the Pinochet case.[259] In 1998, the international community experienced the use of UJ by one state against

[255] John Demjanjuk v. Joseph Petrovsky, United States Court of Appeals (Sixth Circuit, 1985) 776 F 2d.
[256] See chapter four at 4.2.1.1: The adoption of the universal jurisdiction expressly under national legislation. See also William A. Schabas, (n 252), 698; William A. Schabas, *An Introduction to the International Criminal Court*, (2edn, Cambridge University Press, 2004) 20; Bruce Broomhall, 'The International Criminal Court: A Checklist for National Implementation', (1999) 13 quater, Nouvelles etudes pénales 113.
[257] Statute for the (ICTY) International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. S/RES/827 (1993) (amended 1998), reprinted in 32 I.L.M. 1192 (1993); Statute for the (ICTR) International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1598 (1994); Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (amended 2010) [hereinafter Rome Statute].
[258] Rome Statute, Preamble.
[259] Pinochet Case, (n 246). See also Human Rights Watch, The Extradition of General Augusto Pinochet, (October 14, 1999), available at http://www.hrw.org/news/1999/10/14/extradition-general-augusto-pinochet [accessed 6-12-2019].

a former head of another state for the first time [260] when the former Chilean dictator Augusto Pinochet was arrested in London as a consequence of an arrest warrant which had been issued by the Spanish National Court.[261] The Spanish Penal Code has considered the crime of torture to be subject of UJ since the ratification of the Convention against Torture in 1987.[262] Accordingly, the Spanish National Court exercised UJ and issued an arrest warrant against Pinochet. It is worth noting that the British judicial system released and allowed Pinochet to leave Chile in March 2000 for medical reasons.[263]

Although Pinochet was not extradited to Spain, his arrest in London was a positive step in the fight against impunity.[264] In addition, the decision of the Criminal Chamber of the Spanish Court had an important impact at the international level due to the following reasons: first, this case showed that torture is considered a violation of peremptory norms that requires the exercising of UJ over its perpetrators to bridge the impunity gap.[265] In this regard, the House of Lords confirmed that the crime of torture is subject to the exercise of UJ,[266] as stated by Lord Browne Wilkinson:

> *The jus cogens nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed. International law provides that offences jus cogens may be punished by any state because the offenders are common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution.*[267]

[260] Ignacio De la Rasilla, 'The Swan Song of Universal Jurisdiction in Spain', (2009) 5 International Criminal Law Review 777, 784. See also Dalila Hoover, (n 150), 73-74.
[261] Human Rights Watch, (n 251).
[262] Máximo Langer, 'The diplomacy of universal jurisdiction: the political branches and the transnational prosecution of international crimes', (2011) 105 The American Journal of International Law 1, 37.
[263] Observations by the United Kingdom on the scope and application of the principle of universal jurisdiction at the 66th session (2011). Full texts of replies, available at <http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/UK&Northern%20Ireland.pdf> (accessed 20/7/2020)
[264] Human Rights Watch, (n 251).
[265] Wolfgang Kaleck, 'From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008', (2009) 30 Michigan Journal of International Law 927, 954.
[266] Christine M. Chinkin, 'In Re Pinochet. United Kingdom House of Lords: Regina v. Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)', (1999) 93 American Journal of International Law 704.
[267] Regina v. Bartle and the Commissioner of Police for the Metropolis and Others (Exparte Pinochet), House of Lords, 24 March 1999, opinion of Lord Browne-Wilkinson. See also ibid, opinion of Lord Millet and opinion of Lord Phillips.

Secondly, it was confirmed that a former president of any State cannot enjoy immunity in the perpetration of such crimes.[268] This point of view was emphasised later in the Habré case.[269] In this matter, it has been confirmed that the holders of diplomatic immunity during the performance of their functions enjoy temporary procedural immunity from the national criminal jurisdiction of foreign states.[270] In fact, diplomatic immunity is not granted to a person *per se* but to his or her status as representative of the State to carry out the duties entrusted to them.[271] Therefore, criminal jurisdiction can be exercised over high-ranking officials by foreign national courts after leaving office.[272] Hence, it can be noticed that diplomatic immunity temporarily precludes the exercise of criminal jurisdiction in all its forms by foreign national courts.[273] However, once the accused is discharged from office as the representative of a State, there will be no diplomatic immunity that may prevent the exercise of criminal jurisdiction.[274]

The international community witnessed during this period another important case, Congo v. Belgium, the Arrest Warrant Case.[275] In this case, Belgium exercised absolute UJ and issued an arrest warrant against the Minister of Foreign Affairs in Congo, Mr. Abdulaye Yerodia Ndombasi.[276] This issue was referred by Congo to the ICJ,[277] and the Congo objected on the grounds that the accused enjoyed diplomatic immunity.[278] The ICJ concluded that Belgium violated its international obligation to respect the immunity of a minister by issuing the arrest

[268] Ariel Lett, 'The Meaningless Existence of Universal Jurisdiction', (2014) 23 Michigan State International Law Review 545, 556. See also Xavier Philippe, 'The principles of universal jurisdiction and complementarity: how do the two principles intermesh?', (2006) 88 International Review of the Red Cross 375, 376.
[269] Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) judgment, I.C.J. Reports 2012, p. 422. See also Chad Lifts Immunity of Ex-Dictator: Green Light to Prosecute Hissène Habré in Belgium, Human Rights Watch (December 5, 2002) available at <https://www.hrw.org/news/2002/12/05/chad-lifts-immunity-ex-dictator> (accessed on 27/7/2019).
[270] On the basis of immunity arguments, national courts in the UK have rejected arrest warrant requests against Robert Mugabe President of Zimbabwe and Gen. Shaul Mofaz, defence minister of Israel. See Re Mofaz, United Kingdom, Bow St. Magistrates' Court, the judgment of 12 February 2004, ILR, vol. 128, p. 712. See also Tatchell v. Mugabe, United Kingdom, Bow St. Magistrates' Court, the judgment of 14 January 2004, ILR, vol. 136, p. 573.
[271]Summaries of Judgments, Advisory Opinions and Orders of The International Court of Justice (1997-2002), Publications ST/LEG/SER.F/1/Add.2, United Nations, 2003, Merits of the case (paras. 45-71), p. 212.
[272] Ilias Bantekas and Susan Nash, *International Criminal Law*, (2nd ed.Cavendish Publishing Limited, 2003) 170-172.
[273] Jana Panakova, 'Law and politics of universal jurisdiction', (2011) 3 Amsterdam law forum 49, 57.
[274] Arrest Warrant Case, (n 240), paras. 61, p. 22.
[275] Ibid. 70.
[276] Ibid. See also Gabriel Bottini, (n 67), 507; Dalila Hoover, (n 150), 97.
[277] Arrest Warrant Case, (n 240), 70.
[278] Summaries of Judgments, Advisory Opinions and Orders of The International Court of Justice (1997-2002), Publications ST/LEG/SER.F/1/Add.2, United Nations, 2003, p 208.

warrant.[279] The reason for this view is that there is no international rule allow national courts to exercise their jurisdiction over persons with diplomatic immunity.[280]

As a consequence of the ICJ judgement the national legislation that authorized the exercise of UJ over the holders of diplomatic immunities has been amended by the Belgian Legislature in 2003.[281] The new legislation provides that the suspect cannot be arrested if he is an official guest of the Government or a worker of an international organization located on Belgian territory.[282] The importance of this case can be highlighted by the fact that despite the significant adoption of UJ, there have been differences in how states define it[283] as some states provided absolute UJ prior to restricting it with preconditions.[284] Accordingly, it can be noticed that the provision of UJ has gone through stages of evolution under national law in some states. Due to the fact that absolute UJ in these states was criticised, these states added preconditions to the practice UJ.[285] This is issue will be discussed in more detail in chapter four.

In light of the above, it can be concluded that various issues have faced the principle of UJ, which has led to serious dilemmas. Based on this, it is suggested here that a deep consideration of this principle would be timely, and a discussion of emerging factors and perspectives could be used to improve the way the principle is implemented in practice. In practice, the principles of international law develop along with the continued development of that law. Based on this, it must be acknowledged that universality is a developing subject, requiring to be studied.[286] Hence, the ILC, through their role in the codification of international law, should contribute to regulating and codifying the principle of UJ.

[279] Ariel zemach, (n 216), 159.
[280] International Law Commission, sixty-fourth session Geneva (2012), Preliminary report on the immunity of State officials from foreign criminal jurisdiction, Prepared by Special Rapporteur Ms. Concepción Escobar Hernández, A/CN.4/654, 31 May 2012, para 9 at p.4.
[281] Jana Panakova, (273), 61.
[282] Sienho Yee, 'Universal Jurisdiction: Concept, Logic, and Reality', (2011) 10 Chinese Journal of International Law 503, 522.
[283] Amnesty International, (n 128), 12-16.
[284] Amnesty International, (n 21), 58-60.
[285] Pavel Caban, (n 147), 185.
[286] Gabriel Bottini, (n 67), 559. International Law Association, (n 139), 10-19.

2.4: Summary.

Initially, this chapter highlighted the historical and philosophical background of UJ and argued that the concept of UJ can be found in the 6th Century Code of Justinian.[287] Though the term 'UJ' was not mentioned directly in the Justinian Code, quasi-UJ was recognised and exercised by the Code.[288] The application of such jurisdiction was based on two main elements: firstly, the nature of the crime that threatened the society's security due to the difficulty of arresting and prosecuting the perpetrators,[289] such as vagabonds, assassins and bandits.[290] Second, was the presence of the offender as jurisdiction was not exercised in the absence of the offender.[291] Therefore, it is clear that absolute jurisdiction was not accepted under the Justinian Code because jurisdiction was granted to the court of the place where the accused was arrested: "judex deprehensionis".[292] Accordingly, it can be concluded that the roots of UJ, which was exercised during Justinian's era, were conditional on the presence of the accused.

It should be noted that the philosophical background of UJ has continued to develop after the medieval period as a number of jurists, such as Grotius, gave significant attention to this issue during the Renaissance period.[293] Groitus argued that the law of human solidarity should subsist in a universal society of mankind: "societas generis humani".[294] Accordingly, crime should be considered a violation of the natural laws that govern society, so a universal obligation to punish either by punishment or extradition should be the responsibility of the state where the offender was located.[295]

The chapter also discussed another important issue, which is whether UJ is equivalent to *actio popularis*.[296] In this regard, it was concluded that UJ is often exercised by states that act on behalf of the international community in a manner that could be said to be equivalent to the Roman concept of *actio popularis*.[297] Furthermore, this chapter discussed the legal

[287] Harry Gould, (n 1), 11. See also Francis Fukuyama, (n 8), 268.
[288] Yana Shy Kraytman, (n 22), 120.
[289] Yana Shy Kraytman, (n 22), 120.
[290] Paola Gaeta, (n 3), 907-208.; Ilkka Pyysiäinen ed, (n 33), 137.
[291] Ryan Rabinovitch, (n 14), 517.
[292] Ryngaert Cedric, (n 16), 127.
[293] Amnesty International, (n 21), 1.
[294] Yana Shy Kraytman, (n 22), 120.
[295] Paola Gaeta, (n 3), 908.
[296] Harmen van der Wilt, (n 39), 238.
[297] Mahmoud Cherif Bassiouni, (n 1), 88.

equivalence of Islamic law and UJ based on the fact that the Roman notion of *actio popularis* was known under Islamic law as *Al-Hisbah*.[298] Regarding the status of Islamic law on UJ, most of Islamic law principles are consistent with international law norms. Consequently, the understanding of some of Islamic law principles such as "promote virtue and prevent vice" could be extended to cover the principle of UJ.

Practically speaking, the chapter discussed the emergence of an international customary rule that considers the principle of UJ as criminal jurisdiction over maritime piracy crimes. In this regard, it was observed that the aforementioned philosophical background paved the way for the emergence of the international custom that considered piracy to be the subject of UJ. This is due to the particular circumstances that surround the commission of piracy, such as the crime scene for this offense being the high seas.[299] Thus, UJ began as a means of tackling piracy.[300]

Then, the Lotus was discussed as it paved the way for extending the scope of UJ to cover the most serious crimes as it authorised the exercising of extraterritorial jurisdiction as long as it does not contradict international law.[301] Following the end of World War II, the scope of UJ was extended to include the most serious criminal acts such as war crimes and genocide.[302] Therefore, UJ became internationally recognised over certain international crimes under customary international law.[303] In this matter, it was mentioned that the scope of UJ has been expanded since the World War II to include the most serious criminal acts such as war crimes and genocide following the killing of millions of people in that war and wars that preceded it.[304] This rapid expansion of the scope of UJ under customary international law could be attributed to the notion of ''Grotian Moment''[305] or ''constitutional moment for international law.''[306] In this regard, it was argued that this moment is a pivotal moment in international law where a customary rule arises and evolves more rapidly than usual in response to

[298] Adnan El Amine, (n 6), 393.
[299] Malcolm N Shaw, (n 1), 609.
[300] Yana Shy Kraytman, (n 22), 120.
[301] Florian Jessberger, (n 248), 236.
[302] Robert Cryer, (n 141), 30-36.
[303] Petra Baumruk, (n 145), 47.
[304] Ibid. See also Yana Shy Kraytman, 'Universal Jurisdiction – Historical Roots and Modern Implications', (2005) 2 Brussels Journal of International Studies 94, 103.
[305] Michael P. Scharf, (n 152) 4.
[306] Leila Nadya Sadat, (n 156), 1206; Bardo Fassbender, (n 156), 529.

significant changes in the international community.[307] This moment happens usually during a time of significant change in the world, such as, the outbreak of the two world wars and the scale of their losses which is unprecedented in the history of mankind.[308] Consequently, it is argued that the second world war period was Grotian moment that led to the expansion in the scope of UJ to include the most serious crimes, which caused the death of millions of people in the war.

On the other hand, the principle of UJ has been recognized implicitly in many international conventions. However, none of these convention governs the principle of UJ comprehensively.[309] Therefore, it was argued that UJ over international crimes is still developing and there are no clear international texts regulating its exercise.[310] Accordingly, there is need to regulate and codify the principle of UJ in draft articles by the ILC.[311]

[307] Michael P. Scharf, (n 152), 6-7.
[308] Ibid.
[309] Report of the Sixth Committee. 64th session on "the scope and application of the principle of universal jurisdiction", UN. Doc. No. A/62/425 (16 December 2009); Sienho Yee, (n 282), 504.
[310] Charles Chernor Jalloh, Universal criminal jurisdiction, in Report of the International Law Commission on the Work of its 70th Session' [Annexes. A] (2018) UN Doc A/73/10, at 307.
[311] See Pavel Caban, (n 147), 194. He mentioned to such a proposal in his article.

Chapter Three: The Nature of Universal Jurisdiction (UJ) and the Legal Framework for Its Exercise.

3.1: Introduction.

The previous chapter discussed the historical evolution of the principle of UJ. It was argued that UJ has a long history that can be traced back to 6th Century Code of Justinian.[1] Furthermore, it was noted that piracy is considered to be the starting point for the exercising of UJ[2] due to the fact that the crime of piracy is often committed on the high seas, outside the territory of any country.[3] Therefore, UJ has been exercised for hundreds of years over the crime of maritime piracy.[4]

The concept of UJ now extends to include the most serious international crimes following World War II.[5] It is commonly accepted that the exercise of UJ has been legalised under the international customary law with regard to offenses considered especially heinous by the international community, for instance, war crimes, genocide, and crimes against humanity.[6] Despite this international recognition of UJ as a principle, there is still confusion about determining the scope and definition of UJ. In this matter, the ILC stated:

> State practice regarding the exercise of universal jurisdiction reveals that aspects of the nature and substantive content of the principle are mired in legal controversy.

[1] Christopher Keith Hall, 'Universal Jurisdiction: New Uses for an Old Tool', in Mark Lattimer and Philippe Sands (eds), *Justice for Crimes Against Humanity*, (1st edn Oxford: Hart 2003) 50.
[2] Aaron X. Fellmeth and Maurice Horwitz, *Guide to Latin in International Law*, (1st edn, Oxford University Press, 2009) 68. "Crimen contra omnes. krē´mān kōn´tra ōm´nās. krī´men kan´tru am´nēz. n. "Crime against all." A crime against humanity as a whole, such as piracy, slavery, genocide, or terrorism". See also Harry Gould, *The legacy of punishment in international law*, (1st edn, Palgrave Macmillan, 2010) 84.
[3] Eugene Kontorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation', (2004) 45 Harvard International Law Journal 183, 190.
[4] Ibid, 184.
[5] Robert Cryer, *Prosecuting International Crimes Selectivity and the International Criminal Law Regime*, (1st edn, Cambridge University Press 2005) 30-36.
[6] Michael P. Scharf, 'Universal Jurisdiction and the Crime of Aggression', (2012) 53 Harvard International Law Journal, 366. See also Pavel Caban, 'Universal Jurisdiction Under Customary International Law, International Conventions and Criminal Law of the Czech Republic: Comments', (2013) 4 Czech Yearbook of Public & Private International Law 173, 178

> States appear generally to agree on its legality, at least in certain circumstances, and on the fact that it is, in principle, a useful and important tool in combating impunity.[7]

Accordingly, this chapter discusses the legal definition of UJ and its conceptual boundaries. To do so, this chapter discusses the definition of UJ, the relationship between UJ and other traditional forms of jurisdiction. After that, in order to determine the scope of this principle, the chapter critically examines the international crimes over which UJ can be exercised. This includes the crime of piracy as the historical basis for UJ; the 'classic' UJ, and crimes such as genocide, torture, and crimes against humanity, that have recently been recognized as being the subject of UJ. It is worth mentioning that the ICC has recently considered the destruction of the environment as a crime against humanity,[8] which is examined later in the chapter. Following which, the possibility of exercising UJ over the crime of terrorism in the absence of uniform international definition of terrorism is discussed.

3.2: The Legal Definition of UJ and Its Conceptual Boundaries.

There are five grounds of criminal jurisdiction that have been acknowledged in international law: territorial jurisdiction, nationality jurisdiction, protective jurisdiction, passive personality jurisdiction and UJ.[9] It is noteworthy that the legislation and state practice generally evidences a link between the offense and the enforcing state founded on the offense's territorial effect or as the nationality of the offender or the victim.[10] In this regard it is argued that territoriality and nationality grounds are an uncontroversial basis of jurisdiction in national and international law. Both of them have significant roles to play in the suppression of

[7] Charles Chernor Jalloh, Universal criminal jurisdiction, in Report of the International Law Commission on the Work of its 70th Session' [Annexes. A] (2018) UN Doc A/73/10, par 7. p 309.

[8] Office of the Prosecutor of the ICC, Policy paper on case selection and prioritisation,15 September 2016, see par 40,41. pp 134-14. Available at https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf (accessed 29 April 2019).

[9] Petra Baumruk, *The Still evolving Principle of Universal Jurisdiction*, (PhD Thesis Charles University in Prague, 2015) 21. See also Anthony J. Colangelo, 'The Legal Limits of Universal Jurisdiction', (2006) 47 Virginia journal of international law 149, 150.

[10] Mahmoud Cherif Bassiouni, 'Universal jurisdiction for international crimes: historical perspectives and contemporary practice', (2001) 42 Virginia Journal of International Law 81, 103.

international crimes.[11] However, the universality principle allows a state to exercise the jurisdiction in the absence of other more traditional forms of jurisdiction.

Theoretically, the concept of UJ is at odds with the notion of national sovereignty, which is the historical ground of national criminal jurisdiction. Indeed, the exercise of UJ transcends the accused's right to be prosecuted by the their national legal system, which is s a lineament of the classical practice of territorial jurisdiction.[12] Nevertheless, the implementation of UJ over certain international crimes does not mean it has priority over other forms of jurisdiction, or it must be devoid of any link to the enforcing state.[13] Hence, this section will address the definition of UJ and its conceptual boundaries.

3.2.1: The Definition of UJ.

To understand the principle of UJ, it is helpful to analyse and identify the origin of each word in the term. The term 'jurisdiction' comes from two Latin words, firstly, *juris*, meaning "Law" and *dicere* or *diction,* meaning "to speak".[14] The term denotes the procedural power granted to an officially constituted lawful body or to the government officials to transact with and make decisions on legal issues for the administration of justice within a specific area of responsibility.[15]

According to Oxford English Dictionary 'jurisdiction' means "The official authority that has the power of making the judgements and legal decisions".[16] In addition, it means that "The sphere of activity or territory to which the power of the legal and judicial institutions

[11] Robert Cryer, (n 5), 75. See also Mari Takeuchi, *Modalities of the Exercise of Universal Jurisdiction in International Law*, (PhD Thesis University of Glasgow 2014) 30.
[12] Mahmoud Cherif Bassiouni, (n 10), 96. See also Dalila Hoover, 'Universal jurisdiction not so universal: time to delegate to the International Criminal Court?', (2011) 8 Eyes on the International Criminal 73, 80-84. See also Christian Tomuschat and Jean-Marc Thouvenin, *The Fundamental Rules of The International Legal Order Jus Cogens And Obligations Erga Omnes*, (1st edn, Martinus Nijhoff Publishers, 2006) 348.
[13] Mahmoud Cherif Bassiouni, (n 10), 104.
[14] Academic Dictionaries and Encyclopedias, Jurisdiction, Interpretation Jurisdiction, available at <http://enacademic.com/dic.nsf/enwiki/9861/Jurisdiction> (accessed on 19/2/2018), See also Petra Baumruk, (n 9), 14. See also USLegal, Civil Procedure, Jurisdiction, available at <https://civilprocedure.uslegal.com/jurisdiction/> (Accessed on 19/2/2018).
[15] Aaron X. Fellmeth and Maurice Horwitz, (n 2), 246.
[16] English Oxford Dictionary, Definition of jurisdiction in English, available at <https://en.oxforddictionaries.com/definition/jurisdiction> (Accessed on 19/2/2018).

extends".[17] In French, the term "jurisdiction" has also multiple meaning that can be used to denoted the authority and the duty to achieve the justice by applying the law: "Le pouvoir et devoir de rendre justice".[18] In addition, it can be used to express the state authority in general (*pouvoir de l' Etat* or *largo sensu*). Furthermore, it can be used in the sense of establishing an official body to exercise judicial authority.[19] It is worth mentioning that the term 'jurisdiction' was defined by the Harvard Draft under article 1 (b) as follows: "A State's "jurisdiction" is its competence under international law to prosecute and punish for crime".[20]

The term 'universal' derives from Old French and means "occurring everywhere" or "pertaining to the whole of something specified", which comes from the Latin word "universalis ", meaning "belonging to all".[21] According to the OED, 'universal' means "relating to or done by all people or things in the world or in a particular group; applicable to all cases".[22] Donnelly suggested that

> Little is universal in this sense, other than formal logical systems of propositions, such as mathematics, and perhaps some of the laws of physics (or God). Thus, the OED describes this sense as 'chiefly poetic or rhetorical' (to which, I think, we could add 'philosophical' or 'theological'). This 'occurring everywhere' sense of universal is secondary and specialized. The primary sense of universality is relative to a particular 'universe' of application (rather than everywhere in the universe).[23]

In regard of UJ, the question that arises why the word 'universal' was used instead 'international'. First of all, universality had been used in the Universal Declaration of Human Rights 1948.[24] Indeed, this term has been widely discussed in the field of international human rights law.[25] This is due to the jurisprudential argument between the supporters of the

[17] Ibid.
[18] Ibid.
[19] Aaron X. Fellmeth and Maurice Horwitz, (n 2), 246.
[20] Harvard Research in International Law, Draft Convention on Jurisdiction with Respect to Crime, (1935) 29 The American Journal of International Law, art 1(b). 439.
[21] Online Etymology Dictionary, Universal, available at <https://www.etymonline.com/word/universal?ref=etymonline_crossreference> (Accessed on 18/2/2018)
[22] English Oxford Dictionary, Main definitions of universal in English, available at <https://en.oxforddictionaries.com/definition/universal> (Accessed on 19/2/2018).
[23] Jack Donnelly, 'International Human Rights: Universal, Relative or Relatively Universal?', in Mashood Baderin and Manisuli Ssenyonjo (eds), *International Human Rights Law: Six Decades After the UDHR and Beyond*, (1st edn Burlington, Ashgate Publishing, 2010) 32.
[24] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: http://www.refworld.org/docid/3ae6b3712c.html [accessed 11 March 2018]
[25] Jack Donnelly, 'The Relative Universality of Human Rights', (2007) 29 Human Rights Quarterly 281.

universal theory of human rights, "Universalism", and the supporters of the relative theory of human rights, "Relativism".[26] In the matter of human rights, the supporters of universalism relied on natural law, so states and international instruments are not the originators of these rights, but rather they are revealing them.[27] Accordingly, they argue that the rights are universal everywhere and should not be different in the concept and scope of application for any reason because there is no room for relativism.[28] On the other hand, supporters of relativity believe that the concept of human rights is relative, specific to each society and culture.[29]

By contrast, in criminal matters, there has been a philosophical discussion about whether the idea of universality find its legal legitimacy in natural law or positive law.[30] Grotius developed the foundations of UJ over offenses that breach natural law and the law of human solidarity: "*societas generis humani*".[31] In this regard, Bassiouni said that

> *For the naturalist, a concept of universal wrongs can be identified with reference to natural law, while for the legal positivist, it cannot. Thus, the evolution of legal concepts, such as nullum crimen sine lege, nulla poena sine lege, whose genesis is in the writings of Montesquieu, but later reflected in the positivism of criminal law of the 1800's European criminal codifications, flew in the face of the abstract notion of universal wrongs identified by reference to natural law.*[32]

However, natural law as a scientific basis for the emergence of UJ is problematic and it is more likely that it emerged under customary international law, which considered piracy as the starting point for the emergence of UJ. Later, the scope of UJ expanded to include the most serious international crimes such as war crimes and genocide that violate peremptory norms under international law.[33]

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[26] Jessica Almqvist, *Human Rights, Culture, and the Rule of Law,* (1st edn, Hart Publishing, 2005) 137.
[27] Jack Donnelly, (n 25), 284.
[28] Ibid, 285.
[29] Jessica Almqvist, (n 26), 137.
[30] Harry Gould, (n 2), 17-18. See also Malcolm Shaw, *International Law*, (6th edn. Cambridge University Press, 2008) 49.
[31] Petra Baumruk, (n 9), 43. See also Yana Shy Kraytman, 'Universal Jurisdiction – Historical Roots and Modern Implications', (2005) 2 Brussels Journal of International Studies 94, 120.
[32] Mahmoud Cherif Bassiouni, (n 10), 99.
[33] Claus Kreb, Universal Jurisdiction over International Crimes and the Institut de Droit international, (2006) 4 Journal of International Criminal Justice, 573-576.

On the other hand, the term “universality” has been used to distinguish it from international criminal jurisdiction. In this matter, the term "UJ" is used to describe the criminal jurisdiction that has been exercised by the national courts over certain international crimes, regardless of where the crime was committed, the nationality of the perpetrator or victims.[34] By contrast, the term ‘international criminal jurisdiction’ is used to describe the criminal jurisdiction that has been exercised by international criminal tribunals and court. Accordingly, the word ‘universal’ has been used instead of the term of international in order to distinguish UJ, which is exercised by the national courts, from international criminal jurisdiction, which is exercised by international tribunals.[35] The distinction between UJ and international criminal jurisdiction is discussed further in chapter five.

The term ‘UJ’ was coined 1935 by the Harvard Draft under article 9 in reference to piracy.[36] It was first used in reference to war crimes by Cowles in 1945,[37] who used the term to argue that war crimes are similar to piracy and brigandism, so every state has an interest in punishing the perpetrators on behalf of the international community.[38]

The principle of UJ has various descriptions, including “The ability of the prosecutor or investigating judge of any state to investigate or prosecute persons for crimes committed outside the crimes, including statutes of limitation, immunities and prohibitions of retrospective criminal prosecution over conduct that was criminal under international law at the time it occurred.”[39] In general, the principle of UJ means that the criminal jurisdiction that is exercised over the most serious crimes on behalf of the international community.

[34] Anthony J. Colangelo, ‘Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law’, (2007) 48 Harvard International Law Journal 121, 130.
[35] Eugene Kontorovich, (n 3), 184.
[36] Harvard Research in International Law, (n 20), art 9, p. 440.
[37] International Law Association, Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences, prepared by the Committee on International Human Rights Law and Practice, submitted to (London Conference, 2000), p 3. See also Willard B. Cowles, ‘Universal Jurisdiction over War Crimes’, (1945) 33 California Law Review 177, 218.
[38] Ibid.
[39] Preliminary Report on The Obligation to Extradite or Prosecute (Aut Dedere Aut Judicare), By Mr. Zdzislaw Galicki, Special Rapporteur, Documents of The Fifty-Eighth Session ILC, Doc. A/Cn.4/571, (7 June 2006) par 19. [hereinafter Preliminary Report].

Regardless of who commits the crime and wherever they are committed, the nature of these crimes affects the interests of the international community.[40]

Doctrinally, the principle of UJ is based on the heinous nature of the crimes.[41] Therefore, when national courts prosecute the perpetrators of the crimes, they are acting on behalf of the international legal system.[42] The Princeton Principles define UJ as follows:

> universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.[43]

It is worth mentioning that the definition of UJ was criticised by Judge Van den Wyngaert,[44] who argued that UJ lacks a generally accepted definition under customary or conventional international law.[45] However, there is a common understanding of the concept of UJ in the international community involving the exercise of criminal jurisdiction by states without any relation to nationality or territorial aspects.[46] Despite the absence of an internationally accepted definition, a significant number of scholars have defined UJ. For example, O'Keefe states it is "the assertion of jurisdiction to prescribe in the absence of any other accepted jurisdictional nexus at the time of the relevant conduct".[47] In addition, it has also been defined as follows: "universal jurisdiction is the exercise of jurisdiction by a State over a person who is said to have committed a limited category of international crimes, regardless of where the offence took place and irrespective of the nationality of the offender or the victim".[48]

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[40] Nicolaos Strapatsas, 'Universal jurisdiction and the International Criminal Court', (2002) 29 Manitoba Law Journal 1, 11. See also, Gabriel Bottini, 'Universal jurisdiction after the creation of the International Criminal Court', (2004) 36 New York University Journal of International Law and Politics 503, 510.

[41] Rephael Ben-Ari, 'Universal jurisdiction: chronicle of a death foretold?', (2015) 43 Denver Journal of International Law and Policy 165, 169-170.

[42] Anthony J. Colangelo, (n 9), 162.

[43] The Princeton Principles on Universal Jurisdiction, (2001) 28 Princeton University Program in Law and Public Affairs, 28-30.

[44] Dissenting opinion of judge van den wyngaert, ICJ, Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v.Belgium), Judgment,Feb. 14, 2002), para 44.

[45] Ibid. See also Mark A. Summers, 'The International Court of Justice's Decision in Congo V. Belgium: How Has It Affected the Development Of A Principle Of Universal Jurisdiction That Would Obligate All States To Prosecute War Criminals?', (2003) 21 Boston University International Law Journal 64, 89.

[46] Petra Baumruk, (n 9), 28-29.

[47] Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept', (2004) 2 Journal of International Criminal Justice 735, 745.

[48] Ben Brandon, Max du Plessis, *The Prosecution of International Crimes A Practical Guide to Prosecuting ICC Crimes in Commonwealth States*, (London, Commonwealth Secretariat, 2005) 22; C. F Swanepoel, 'Universal

Generally, all sources have formulated similar underlying principle of UJ. This fact is that there are certain crimes could be prosecuted by any state regardless of where the crimes were committed, the nationality of the perpetrator and victims.[49]

Accordingly, it can be argued that the main elements of UJ can be considered in the following way: firstly, UJ is an exception to traditional forms of criminal jurisdiction.[50] This jurisdiction does not require any traditional links such as nationality or territory to be exercised. The only link between the offence and the prosecuting state that could be required is the physical presence of the accused within the jurisdiction of the prosecuting state.[51]

The second element of UJ is the exceptional nature of its legal scope. As it is supposed to be exercised over a limited number of crimes that are classified as a violation of jus cogens under international law. In addition, these crimes are characterized by the nature of the commission or by the serious violations that they cause.[52] For instance, that piracy is subject to UJ is undisputed, because it is usually committed on the high sea where no state exercises sovereignty.[53] In addition, war crimes are subject to UJ because of its gravity and the seriousness of its consequences.[54] Therefore, such crimes are of concern to the international community as a whole, and every state can exercise UJ on this basis.[55]

The third element is the absence of an effective jurisdiction.[56] UJ is a secondary mechanism that should only be exercised if the national and territorial states are unwilling or unable to exercise their criminal jurisdiction over international crimes.[57] Accordingly, UJ can be defined

jurisdiction as procedural tool to institute prosecutions for international core crimes', (2007) 32 Journal of Juridical Science 118, 119.

[49] Harry Gould, (n 2), 82. See also Rephael Ben-Ari, (n 41), 169.

[50] Eberechi Ifeonu, *An Imperial Beast of Different Species or International Justice? Universal Jurisdiction and The African Union's Opposition*, (PhD Thesis University Of British Columbia 2015)163.

[51] International Law Association, (n 37), 2.

[52] Sienho Yee, 'Universal Jurisdiction: Concept, Logic, and Reality', (2011)10 Chinese Journal of International Law 503, 504-505. See also Eberechi Ifeonu, (n 50), 161.

[53] Petra Baumruk, (n 9), 42-48. See also, Tamsin Paige, 'Piracy and Universal Jurisdiction', (2013) 12 Macquarie Law Journal 131, 144.

[54] Roger O'Keefe, 'The Grave Breaches Regime and Universal Jurisdiction', (2009) 7 Journal of International Criminal Justice 811, 812.

[55] Claus Kreb, (n 33), 3-4.

[56] Xavier Philippe, 'The principles of universal jurisdiction and complementarity: how do the two principles intermesh?', (2006) 88 International Review of the Red Cross 375, 379. See also, Cedric Ryngaert, 'The Concept of Jurisdiction in International Law', in Alexander Orakhelashvili (eds), *Research Handbooks in International Law Series*, (1st edn, Edward Elgar Publishing Ltd, 2015) 65.

[57] Claus Kreb, (n 33), 580. See also Fannie Lafontaine, 'Universal Jurisdiction the Realistic Utopia', (2012) 10 Journal of International Criminal Justice 1277, 1286.

as follows: UJ is the exclusive criminal jurisdiction that can be exercised over those accused of committing a certain number of international crimes by national courts of any State on whose territory the accused is present, especially in the absence of one of the more established principles of international jurisdiction.[58]

3.3: International Crimes Subject to UJ

Most international criminal law scholars believe that the term international crimes involves a limited number of crimes, namely crimes against humanity, war crimes, genocide, and aggression.[59] Such believe is due to the criminalisation of these acts and the prosecution of their perpetrators by most international criminal courts since the Nuremberg tribunals.[60] Moreover, some scholars argue that torture and terrorism should be added to the list of international crimes, however, this remains controversial.[61]

In this matter, there seems to be a lack of consensus regarding the conceptual aspect of international crimes.[62] Some scholars argue that there is no unified understanding of what makes an international crime distinctive;[63] as O'Keefe who claimed: "[n]o common understanding, let alone common definition of the concept exist."[64] In addition, Bassiouni

[58] Amnesty International, 'Universal Jurisdiction Preliminary Survey of Legislation around the World – 2012 Update', Index: IOR 53/019/2012, October 2012, 7. See also Rephael Ben-Ari, (n 41), 169

[59] Mahmoud Cherif Bassiouni, (n 10), 107. See also William Schabas, *An Introduction to the International Criminal Court,* (4th edn, Cambridge University Press, 2011) 89.

[60] See United Nations, Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), 8 August 1945, 82 U.N.T.C. 280, [hereinafter London Agreement] Nuremberg Charter, (Charter of the International Military Tribunal) (1945) Annex to the London Agreement of 8 August 1945; Tokyo Charter, International Military Tribunal for the Far East Charter (IMTFE Charter) Special proclamation by the Supreme Commander for the Allied Powers at Tokyo January 19, 1946; Treaties and Other International Acts Series N. 1589; Statute for the International Criminal Tribunal for the Former Yugoslavia (ICTY), U.N. Doc. S/RES/827 (1993) (amended 1998), reprinted in 32 I.L.M. 1192 (1993), [hereinafter ICTY Statute]; Statute for the International Criminal Tribunal for Rwanda (ICTR), U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1598 (1994), [hereinafter ICTR Statute]; Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (amended 2010), art 5. [hereinafter Rome Statute].

[61] Kevin Jon Heller, 'What Is an International Crime? (A Revisionist History)', (2017) 58 Harvard International Law Journal 353, 357.

[62] Ibid. See also Mohammed Saif-Alden Wattad, 'The Rome Statute & Captain Planet: What Lies between Crime against Humanity and the Natural Environment', (2009) 19 Fordham Environmental Law Review 265, 270.

[63] Ibid.

[64] Roger O'Keefe*, International Criminal Law*, (1st edn, Oxford University Press, 2015) 47.

argues that “the writings of scholars are uncertain, if not tenuous, as to what they deem to be the criteria justifying the establishment of crimes under international law”[65]

Other scholars have argued that there are legal standards that characterise an international crime, namely, that they involve a criminal act that international law considers universally criminal.[66] However, the definition of an international crime as an action that is considered by international law to be a universal criminal offence raises a crucial question: how does an action, such as a war crime, become a universal crime?

To answer this, Heller raises two points of view, the first one is that some acts are universally criminal because the international law itself has criminalised them, regardless of whether they are criminalised by states. This is called as the "direct criminalization thesis" (DCT).[67] The second holds that the acts are universally criminal because domestic laws have criminalised these acts. The criminalisation of domestic law is the legal source of the universality criminal. In this matter, Kevin Heller called this view by the “national criminalization thesis” (NCT).[68]

Thus, unlike the crimes covered by classic jurisdiction there are certain serious crimes have special characteristics, so all states have an interest in their suppression.[69] The nature of these crimes has something that makes them a subject of concern for the international community; “the gravamen of these crimes is that they have always consequences a violation against all mankind”.[70] In fact, these crimes are universal as result of their grave nature, which prompted the international community to criminalises them and recognise them as universal crimes.[71]

It is worth mentioning that the commission of such crimes is classified as a violation of *jus cogen*s under international law. Accordingly, the violation of *jus cogens* is the legal criteria that determines that criminal activity can be classified as subject to UJ. This is due to the fact that the violation of *jus cogens* norms establishes an obligation on all states (*erga omnes*) to

[65] Mahmoud Cherif Bassiouni, *International Crimes: The Ratione Materiae of International Criminal Law: Sources, Subjects, and Content,* (3rd edn, Martinus Nijhoff Publishers, 2008) 132.
[66] Kevin Jon Heller, (n 61), 1. See also Mohammed Saif-Alden Wattad, (n 62), 270.
[67] Ibid, 1-5.
[68] Ibid.
[69] Gabriel Bottini, (n 40), 511.
[70] Harry Gould, (n 2), 82
[71] Mohammed Saif-Alden Wattad, (n 62), 273-276.

take the necessary measures to prosecute the perpetrators of these violations.[72] It should be noted that the nature of the crime alone is not sufficient for it to be considered subject to UJ but that this requires a further provision under international law. Thus, there must be an international custom that supports consideration of UJ over the perpetrators of such crimes as a form of fulfilling erga omnes obligation.[73]

This section highlights the international crimes that are recognised internationally as subject to UJ. In addition, it focuses on identifying the basic elements and legal standard of the crimes that give rise to the implementation of UJ. Accordingly, this section examines the crime of piracy as the historic basis for UJ; the 'classic' UJ. In addition, the crime of slavery is another crime that is subject to 'classic' UJ. Then, the crimes that have recently been recognised as being subject to 'modern' UJ are discussed. These crimes involve war crimes, genocide, torture, and crimes against humanity. After that, this section examines the possibility of exercising UJ over environmental destruction and terrorism.

3.3.1: Piracy and UJ

Piracy is considered to be the starting point for the exercise of UJ[74] because it was the sole focus of UJ for hundreds of years.[75] Therefore, it has been argued that piracy is the main historical basis for the application of UJ under international law.[76]

The crime of maritime piracy is one of the most serious ancient phenomena under international law. In fact, it has been known since the sea has been used for communication and travel.[77] As a result of the serious and persistent threat posed by this crime to the freedom of navigation and international traffic, international customary law has long

[72] Michael Scharf, 'The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position', (2001) 64 Law and Contemporary Problems 67, 79.

[73] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Fifty-Third Session (2001), Supplement No. 10 (A/56/10), 113, Article 41(1) ''States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40". See also Robert Kolb, *Peremptory International Law - Jus Cogens a General Inventory*, (Oxford, Hart Publishing, 2015), 106.

[74] Aaron X. Fellmeth and Maurice Horwitz, (n 2) 68. "Crimen contra omnes. krē´mān kōn´tra ōm´nās. krī´men kan´tru am´nēz. n. "Crime against all." A crime against humanity as a whole, such as piracy, slavery, genocide, or terrorism".

[75] Eugene Kontorovich, (n 3), 184.

[76] Mahmoud Cherif Bassiouni, (n 10), 108. See also Dan Jerker B. Svantesson, 'A New Jurisprudential Framework for Jurisdiction: Beyond the Harvard Draft', (2015) 109 American Journal of International Law Unbound 69.

[77] Kenneth C. Randall, 'Universal Jurisdiction Under International Law', (1988) 66 Texas Law Review 785, 793. See also Tamsin Paige, (n 53), 132.

considered piracy as a crime against the interests of the entire international community.[78] Accordingly, this crime has been recognised under the jurisdiction of each state that is able to apprehend perpetrators in accordance with the principle of UJ affirmed by the Geneva Convention on the High Seas of 1958,[79] and subsequently by the 1982 United Nations Convention on the Law of the Sea.[80]

There are three elements to the crime of piracy, which will be considered in turn. The first one is the definition of piracy and the identification of its legal elements. Secondly, the legal basis and requirements upon which piracy is based. Thirdly, the reasons that make piracy the subject of UJ.

First of all, maritime piracy was defined historically as an armed attack carried out by a ship on the high seas, without the authorisation of a state, with the purpose of obtaining gains, by taking goods and persons or altering the direction of ships.[81] In other word, it includes all illegal acts of violence committed by a ship on the high seas against another vessel.[82]

The Geneva Convention on the High Seas of 1958[83] and United Nations Convention on the Law of the Sea 1982 also define Piracy as including the illegal acts that are done by aircraft in a place outside the jurisdiction of a state by.[84] Article 101 of 1982 Convention notes that

> Piracy consists of any of the following acts:
>
> (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
>
> (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

[78] Harvard Research in International Law, (n 20), art 9, p. 440. See also Mahmoud Cherif Bassiouni, (n 10), 108-109; Harry Gould, (n 2), 84. Malcolm Shaw, (n 30), 609.
[79] Convention on the High Seas, Done at Geneva on 29 April 1958. Entered into force on 30 September 1962., United Nations, Treaty Series, vol. 450, p. 11, p. 82.
[80] Convention on the Law of the Sea, UN General Assembly, Montego Bay, 10 December 1982, 1833 U.N.T.S. 3.
[81] Malcolm Shaw, (n 30), 398.
[82] Kenneth C. Randall, (n 77), 795. See also Ilias Bantekas and Susan Nash, *International Criminal Law*, (2nd edn, Cavendish Publishing Limited, 2003) 95.
[83] Convention on the High Seas, (n 79).
[84] Convention on the Law of the Sea, (n 80).

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).[85]

Accordingly, it can be argued that the crime of piracy under international law contains three basic elements: firstly, the presence of a private ship or private aircraft carrying a group of people committing unlawful acts of violence.[86] In this matter it should be highlighted that the phrase of a private ship or private aircraft means that they should not belong to or be protected by any state.[87] Secondly, the acts should be committed to achieve personal gain or for "for private ends".[88] in this matter, the term of 'private ends' is understood as the absence of state sponsorship or political motivation.[89] Therefore, criminal acts done with state sponsorship or for political purposes do not constitute the crime of piracy.[90] Thirdly, the commission of these acts of violence should be on the high seas or in a place outside the jurisdiction of a state.[91]

Consequently, the crime of piracy can be classified in two ways: firstly, global piracy that occurs in the high seas or in marine areas that are not under the jurisdiction of any state. This type is subject to international law "*gentium jure piracy*"[92] and UJ. This is due to the fact that each state, even if not a flag state, has the authorisation to arrest, prosecute and punish the pirates, through applying the principle of UJ.[93] Secondly, piracy is subject to the national law of the state in cases where piracy occurs in maritime areas under its internal water or territorial sea. In this case, the territorial state will exercise its normal territorial jurisdiction.[94]

[85] Convention on the Law of the Sea, (n 80) art 101.
[86] Tamsin Paige, (n 53), 146.
[87] Mari Takeuchi, (n 11), 58.
[88] Convention on the Law of the Sea, (n 80) art 101. See also, Malcolm Shaw, (n 30), 615
[89] Tamsin Paige, (n 53), 146. See also Yana Shy Kraytman, (n 31), 103.
[90] Ibid.
[91] Mari Takeuchi, (n 11), 58.
[92] Malcolm Shaw, (n 30), 398
[93] Ibid.
[94] Ibid.

In these cases, no other state may intervene to arrest a pirate ship or pirates, because that is a violation on the sovereignty of state territory unless otherwise stipulated in an international agreement.[95]

This situation calls into question the reasons behind the consideration of the piracy as being subject to UJ, the gravity of the crime or the exceptional nature of the crime that means it is not simply subject to national jurisdiction.[96] In accordance with article 101, it was claimed that the exceptional nature of the piracy is the legal basis that led to it being subject to UJ.[97] This is because it frequently overrides the territorial sovereignty of states because of the international recognition for the principle of freedom on the high seas.[98]

Piracy it is often committed outside the territory of states, which make it impossible to exercise traditional jurisdiction.[99] In addition, pirate ships often do not raise the flag of a state, which makes them devoid of any nationality.[100] Accordingly, as a result of the absence of the territorial or nationality principles, traditional jurisdiction does not stand as a hindrance to exercising UJ.[101] In fact, since the nineteenth century, it has been argued that the basis for justifying the exercise of UJ over the crime of piracy was based on the fact that pirates were not under the protection or authority of any state.[102] Therefore, UJ has been exercised over piracy because there is lack of other kinds of applicable traditional jurisdictional.[103] It is worth mentioning that Judge Guillaume argued that "international law knows only one true case of universal jurisdiction: piracy"[104]

However, Kontorovich stated that the above mentioned point of view is inaccurate because the crime of piracy could be covered by passive personality jurisdiction.[105] In this matter, he justified his argument by saying that piracy, although it is committed on the high seas outside the sovereignty of any state, the affected ships are often registered in a state and holds its

[95] Joseph W. Bingham, 'Part IV-Piracy', (1932) 26 The American Journal of International Law 739, 781
[96] Petra Baumruk, (n 9), 98
[97] Convention on the Law of the Sea, (n 80) art 101.
[98] Kenneth C. Randall, (n 77), 791.
[99] International Law Association, (n 37), 3. See also Willard B. Cowles, (n 37), 180.
[100] Tamsin Paige, (n 53), 135.
[101] Malcolm Shaw, (n 30), 611.
[102] Petra Baumruk, (n 9), 98.
[103] Eugene Kontorovich, (n 3), 190.
[104] Separate Opinion of President Guillaume, the Judgment of 14 February 2002, ICJ, Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v.Belgium), Judgment, Feb. 14, 2002).
[105] Eugene Kontorovich, (n 3), 190.

flag and nationality, in addition, the crew are nationals of some countries, so the situation could be covered simply by passive personality.[106]

Though theoretically the above view is acceptable, in practice passive personality jurisdiction is not capable of effectively combating the crime of piracy on the high seas. In addition, in the 1930s, the legality of the passive personality principle was rejected in the Harvard Draft Restatement on jurisdiction.[107] Consequently, the reason that piracy is considered a subject of UJ is not the lack of other traditional jurisdictions, but rather the ineffectiveness of other jurisdictions such as passive personality to combat the crime of piracy.[108] This is due to the circumstances that surround the commission of piracy, such as the crime scene for this offense is usually the high seas.[109] Additionally, piracy is considered to be a violation of *jus cogens*[110] due to the fact that it violates the freedom of the high seas.[111] Accordingly, the violation of the peremptory norm is the basis on which piracy is subject to UJ.

However, Kontorovich also questions the gravity of the crime of piracy. He argued that "the crime of piracy consists of nothing more than robbery at sea".[112] Accordingly, it was argued that piracy should not be considered as an international crime because it lacks the seriousness of other international law crimes such as war crimes.[113] Additionally, the application of UJ should not be based on piracy because of the lack of the gravity of the crime. UJ should have two classifications: firstly, classic or traditional UJ, which applies to piracy,[114] and secondly, modern UJ, which has been recognised recently and covers the most serious international crimes, such as war crimes.[115]

In theory, it can be said that Kontorovich's claim is logical because piracy might not be as grave as other international crimes such as genocide, crimes against humanity and war

[106] John G. McCarthy, 'The Passive Personality Principle and Its Use in Combatting International Terrorism', (1990) 13 Fordham International Law Journal 298, 300-303. See also Robert Cryer, (n 5), 78.
[107] Robert Cryer, (n 5), 78.
[108] Harry Gould, (n 2), 84. See also Dan Jerker B. Svantesson, (n 76), 69.
[109] Malcolm Shaw, (n 30). See also Joseph W. Bingham, (n 95), 790.
[110] Robert Jennings and Arthur Watts, *Oppenheim's International Law: Vol. 1 Peace*, (9th ed. London: Longman Pearson 1992) 528.
[111] Kamrul Hossain, 'The Concept of Jus Cogens and the Obligation Under The U.N. Charter', (2005) 3 Santa Clara Journal of International Law 72, 74.
[112] Eugene Kontorovich, (n 3), 191.
[113] Petra Baumruk, (n 9), 97. See also Mari Takeuchi, (n 11), 57.
[114] Ibid.
[115] Ibid, 100.

crimes. Indeed, these crimes are described by the Rome Statute of the International Criminal Court as “the most serious crimes of concern to the international community as a whole".[116] By contrast, piracy like other crimes mentioned above is classified as a violation of a peremptory norm.

The common factor in international crimes that are subject to UJ is the fact that such crimes constitute a violation of *jus cogens*, and piracy is considered to be a violation of *jus cogens*, due to the fact that it violates the freedom of the high seas.[117] However, it is unclear to what extent piracy can be classified as a violation of *jus cogens* under international law.

In this regard, Professor Oppenheim argued that crime of piracy is a violation of *jus cogens*, so any treaty supporting piracy will be voided for being contrary to the peremptory norm.[118] In addition, several members of the ILC pointed out in the commentaries of the ILC during the 15th session 1963 and the 18th session 1966 that piracy, trade in slaves, or genocide could be cited as clear examples for violation of *jus cogens*.[119] In this matter, it was noted that

> Some members of the Commission felt that there might be advantage in specifying, by way of illustration, some of the most obvious and best settled rules of jus cogens in order to indicate by these examples the general nature and scope of the rule contained in the article. Examples suggested included … (c) a treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to co-operate.[120]

Furthermore, it has been confirmed by national courts that piracy is an example of a violation of a peremptory norm. For instance, the South African Constitutional Court stressed that

> *Along with torture, the international crimes of piracy, slave-trading, war crimes, crimes against humanity, genocide and apartheid require States, even in the absence of binding*

[116] Rome Statute, (n 60), art 1. preamble
[117] Kamrul Hossain, (n 111), 74.
[118] Robert Jennings and Arthur Watts, (n 110), 528.
[119] Report of the International Law Commission, Fifteenth Session, 1963, Official Records of the General Assembly, Eighteenth Session, Supplement (A/5509), Extract from the Yearbook of the International Law Commission: 1963, vol. II A/CN.4/SER.A/1963/ADD.1, at 199.
[120] Report of the International Law Commission, Eighteenth Session, 1966, Official Records of the General Assembly, Twenty-first Session, Supplement No. 9 (A/6309/Rev.1), Extract from the Yearbook of the International Law Commission:1966, vol. II A/CN.4/SER. A/1966/Add. 1, at 248.

international treaty law, to suppress such conduct because all States have an interest as they violate values that constitute the foundation of the world public order.[121]

Although the above statements do not mention why piracy is classified as a violation of *jus cogens*, it is internationally recognised that piracy violates the right to freedom of the high seas. In fact, the freedom of the high seas is accepted internationally as *jus cogens*. Article 89 of the UN Convention on the Law of the Sea 1982 provided that "*No State may validly purport to subject any part of the high seas to its sovereignty*."[122] Accordingly, it is clear that the circumstances that surround piracy, such as the crime scene being the high seas, violates the right of the freedom of the high seas. Hence, it can be argued that if states are not allowed to extend their sovereignty over the high seas, it is important to prevent pirates from exercising any criminal activity on the high seas to avoid impunity for violent crimes.

In light of the above analyses, it can be concluded that piracy is subject to UJ due to the fact that it violates the *jus cogen*s, which recognises the importance of the freedom of the high seas.[123] In addition, as result of the serious and persistent threat posed by piracy to the freedom of navigation and international traffic, international customary law has long considered piracy as being against the interests of the entire international community.[124] Consequently, a customary international rule has emerged that permits the exercise of UJ over the perpetrators of such crimes.[125]

3.3.2: Slavery

Slavery has been linked with piracy since the Declaration of the Congress of Vienna 1815 when traffic in slavery was regarded as subject to UJ.[126] At the Vienna Congress, the international community witnessed for the first time a formal condemnation of the slave trade from many European powers.[127] International condemnation followed in several conventions that described this inhumane behaviour as a crime *jus gentium*, perhaps the most important of

[121] National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another Constitutional Court of South Africa CCT 02/14 Date of judgment:30 October 2014, para 137.
[122] Convention on the Law of the Sea, (n 80), art 89.
[123] Kamrul Hossain, (n 111), 74.
[124] Mahmoud Cherif Bassiouni, (n 10), 108-109. Harry Gould, (n 2), 84. See also Malcolm Shaw, (n 30), 609.
[125] Malcolm Shaw, (n 30). See also Joseph W. Bingham, (n 95), 790.
[126] The slave trade across the high seas from one continent to another was regarded as crimes that should be subject to universal jurisdiction, such as piracy. See Mahmoud Cherif Bassiouni, (n 10), 113.
[127] Robert The, 'State Criminal Jurisdiction', (1967) 9 Malaya Law Review 38, 58.

which was the 1926 Convention to Suppress the Slave Trade and Slavery, in which the signatories pledged to prevent and suppress all forms of slavery.[128]

Slavery was defined in the 1926 Slavery Convention as follows: "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised".[129] Additionally, the slave trade was defined as “all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves”.[130]

Additionally, acts similar to slavery were defined in the 1956 Supplementary Convention on the Abolition of Slavery. Practices similar to slavery include forced marriage, illegal adoption, debt bondage and serfdom.[131] With regard to UJ, the exercise of such jurisdiction under customary international law was allowed over slavery in its traditional form and did not extend to acts similar to slavery. This is due to the fact that there is no legal basis to consider acts similar to slavery to be subject to UJ.

There is no explicit reference to UJ over perpetrators of acts similar to slavery in the above-mentioned convention or other international conventions. Additionally, there is no international custom permitting UJ over acts similar to slavery.[132] Furthermore, there is a hierarchy in international law between slavery and other forms of exploitation, with slavery being the most severe. The control of the person or their work is present in various forms of exploitation to varying degrees, and the most extreme form of control manifests itself in ownership.[133] Accordingly, it was argued that there is international acceptance to allow UJ over perpetrators of slavery but this does not include the acts similar to slavery.

[128] Ibid.
[129] Convention to Suppress the Slave Trade and Slavery, (signed at Geneva on 25 September 1926, entered into force 9 March 1927) 60 LNTS 253, Art. 1(1).
[130] Ibid.
[131] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institution and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, (entered into force 30 April 1957) 266 U.N.T.S. 3. Art 1.
[132] Mahmoud Cherif Bassiouni, (n 10), 114.
[133] UNCHR, ‘Report of the UN Special Rapporteur on Contemporary Forms of Slavery, Including its Causes and Consequences’ (2017) UN Doc A/HRC/36/43, para 8.

Consequently, Principle 2 of the Princeton principles on UJ referred only to slavery as being subject to UJ and did not include the similar acts.[134]

A number of international conventions have established that the slave trade and slavery are subject to UJ.[135] The Institute of International Law, at its meeting in Cambridge in 1931, recommended that states exercise UJ over a list of crimes including the slave trade.[136] It is worth mentioning that slavery is considered to be a subject to UJ because it is universally condemned and deemed a violation of j*us cog*ens. In this matter, 47 international treaties between 1874 and 1996 concerning to slavery consider the crime of slavery to be a violation of *jus cogens*.[137] Additionally, the ICJ has classified slavery as a breach of *jus cogens*, and the protection against slavery as an instance of an obligation *erga omnes*.[138]

It is worth mentioning that the practice of slavery is categorised as crimes against humanity under Principle VI (c) of the 1950 Nuremberg principles.[139] Similarly, Article 7 (2) (c) of the Rome Statute of the ICC,[140] and Article 3 (1) (c) of the draft articles on crimes against humanity 2017, classify the practice of slavery as a crime against humanity.[141] Furthermore, cases of slavery during armed conflict are also classified as war crimes.[142] Consequently, the universal condemnation of slavery has contributed to the international recognition of UJ over slavery. This can be attributed to the fact that slavery is considered to be a violation of *jus cogens*, and

[134] The Princeton Principles on Universal Jurisdiction, (n 43), 28-30.
[135] Mahmoud Cherif Bassiouni, (n 10), 112. See Treaty for the Suppression of the African Slave Trade, signed at London 20 December 1841, arts. 6, 7, 10, and Annex B, pt. 5, 2 Martens Nouveau Recueil (ser. 1) 392. See also The Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition, and Spiritous Liquors (General Act of Brussels), Jul. 2, 1890, 27 Stat. 886, 17 Martens Nouveau Recueil (set. 2) 345, Article 5. see also Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, opened for signature at Lake Success, New York Mar. 21, 1950, art. 11, 96 U.N.T.S. 271.
[136] Resolution on the Conflict of Penal Laws with Respect to Competence, adopted by the Institute of International Law at Cambridge, 31 July 1931, Art. 5.(English translation by Amnesty International) See Amnesty International, Universal Jurisdiction: The Duty Of States To Enact And Enforce Legislation: Chapter 2: The Evolution Of The Practice Of Universal Jurisdiction 31 August 2001, Ior 53/004/2001 availabal at <https://www.amnesty.org/en/documents/document/?indexNumber=IOR53%2F004%2F2001&language=en> (Accessed on 9/11/2017).
[137] Mahmoud Cherif Bassiouni, (n 10), 112.
[138] Barcelona Traction, Light and Power Co, Ltd. (Belgium v. Spain), 1971 I.C.J. 32. (Feb. 5).
[139] Yearbook of the International Law Commission 1950, vol. II, document A/1316, Part III, p. 377, para. 119.
[140] Rome Statute, (n 60), art 7 (2) (c).
[141] Crimes against humanity Texts and titles of the draft preamble, the draft articles and the draft annexe provisionally adopted by the Drafting Committee on first reading, International Law Commission Sixty-ninth session Geneva, 2017, Doc. A/CN.4/L.892. [hereinafter Draft Articles on Crimes against humanity].
[142] Willard B. Cowles, (n 37), 177. See also Mahmoud Cherif Bassiouni, (n 10), 114.

this violation produces an obligation *erga omnes*. So, the exercise of UJ over perpetrators of the practice of slavery is considered as a manifestation of this obligation.

On the other hand, the universal condemnation of the practice of slavery contributed significantly to the diminution of slavery in its traditional form. In this matter, Bassiouni argued that "[a]s in the case of piracy, slavery has all but disappeared in the twentieth century, and that may well have made it possible for states to recognize the application of the theory of universal jurisdiction to what has heretofore been essentially universally condemned."[143] In light of the above analysis, it can be concluded that slavery is historically classified as a crime under UJ because it is considered a violation of *jus co*gens. The exercise of such jurisdiction under customary international law was permitted over slavery in its traditional form and does not extend to acts similar to slavery.

3.3.3: War Crimes

War crimes are some of the most serious crimes that the international community has sought to criminalise.[144] International customary law has recognised war crimes that constitute the most serious breaches of international humanitarian law as subject to UJ.[145] The International Law Association stated that the principle of UJ over war crimes was observed by Cowles in 1945,[146]

> Basically, war crimes are very similar to piratical acts, except that they take place usually on land rather than at sea. In both situations there is, broadly speaking, a lack of any adequate judicial system operating on the spot where the crime takes place-in the case of piracy it is because the acts are on the high seas and in the case of war crimes because of a chaotic condition or irresponsible leadership in time of war. As regards both piratical acts and war crimes there is often no well-organized police or judicial system at the place where the acts are committed, and both the pirate and the war criminal take advantage of this fact, hoping thereby to commit their crimes with impunity.[147]

[143] Ibid.
[144] Kenneth C. Randall, (n 77), 796.
[145] Leora Bilsky, 'The Eichmann Trial and the Legacy of jurisdiction', in Seyla Benhabib (eds), *Politics in Dark Times: Encounters with Hannah Arendt*, (1st edn, New York: Cambridge University Press, 2010) 206.
[146] International Law Association, (n 37), 3.
[147] Willard B. Cowles, (n 37), 194.

Cowles claimed that war crimes are similar to piracy and brigandism, so every state has an interest in punishing the perpetrators on behalf of the international community.[148] The validity of this perception could be attributed to the fact that piracy and war crime share in common that both of them are considered violations of peremptory norms. Mark and Philippe went further in this matter by saying that "[u]niversal jurisdiction over war crimes appears to date to at least the fourteenth century, when the jus militaire (law of arms governing professional soldiers) became recognised as part of the jus gentium (international law)."[149]

The first question that arises in this regard concerns the legal definition of war crimes. As recently as the early twentieth century, a considerable number of international legal instruments define war crimes by enumerating the acts that constitute this crime.[150] For instance, war crimes were formulated in the International Military Tribunal of Nuremberg Article 6 (b) of the London Agreement:

> (b) ' War crimes: ' namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.[151]

However, the Agreement did not deal with the exercise of UJ over war crimes.[152] In this matter, Michael Scharf claimed that the London Agreement followed the example of The Hague Regulations of 1907,[153] and the Geneva Convention Relative to the Treatment of Prisoners of War 1929,[154] "neither of which expressly provided for universal jurisdiction".[155]

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[148] International Law Association, (n 37), 3. See also Willard B. Cowles, (n 37), 180.
[149] Christopher Keith Hall, (n 1), 50. See also Amnesty International, Universal Jurisdiction: The Duty Of States To Enact And Enforce Legislation: Chapter 2: The Evolution Of The Practice Of Universal Jurisdiction 31 August 2001, Ior 53/004/2001 availabal at <https://www.amnesty.org/en/documents/document/?indexNumber=IOR53%2F004%2F2001&language=en> Accessed on 9/11/2017. p 3.
[150] Petra Baumruk, (n 9), 102
[151] London Agreement, (n 60) art 6.
[152] Petra Baumruk, (n 9), 103. See also Gabriel Bottini, (n 40), 530.
[153] International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, available at: http://www.refworld.org/docid/4374cae64.html [accessed 5 February 2018]
[154] International Committee of the Red Cross (ICRC Convention relative to the Treatment of Prisoners of War, Geneva, ad document(s): IHL-GC-1929-2-E (27 July 1929).
[155] Michael Scharf, (n 72), 92

In this context, the four Geneva Conventions 1949 and their two Additional Protocols are considered to be the most comprehensive international instruments prohibiting war crimes.[156] In fact, the war crimes are defined as acts that lead to grave breaches against persons or property protected under the Geneva Conventions of 1949.[157] Furthermore, war crimes are understood to mean any acts that lead to grave breaches to the four Geneva Conventions of 1949.[158] In addition, it is also includes serious violations of Common Article 3 of the Geneva Conventions and other serious violations of the International Humanitarian Law principles, which are covered in several conventions and by customary international laws.[159] These include serious violations of the laws and customs applicable in armed conflicts not of an international character, indiscriminate attacks, the principle of the distinction between civilians and combatants, the principle of feasible precautions and the principle of proportionality.[160]

However, the concept of UJ over war crimes was not clearly provided by the four Conventions and their Additional Protocols.[161] Although, the four Geneva Conventions of 1949 and their two Additional Protocols do not discuss UJ, they use the term "grave breaches":[162]

> Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.[163]

[156] Mahmoud Cherif Bassiouni, (n 10), 116.
[157] Rome Statute, (n 60), art 8 [2] (a).
[158] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31, [hereinafter First Geneva Convention] *Notably, Article 3 is common to the four Geneva Conventions of 12 August 1949.*
[159] Rome Statute, (n 60), art.8.
[160] International Criminal Court, Elements of Crimes, 2011, ISBN No. 92-9227-232-2, available at: https://www.refworld.org/docid/4ff5dd7d2.html [accessed 7 July 2020]. at 1-4. See also Markus Wagner, 'The ICC and its Jurisdiction - Myths, Misperceptions and Realities', (2003) 7, Max Planck Yearbook of United Nations Law 409, 413-417 and 423.
[161] Petra Baumruk, (n 9),103.
[162] Mahmoud Cherif Bassiouni, (n 10), 117.
[163] First Geneva Convention, (n 158), Art 50. Notably it is common to the four Geneva Conventions of 12 August 1949. See also Art 51 of the Second Geneva Convention, Art 130 of the Third Geneva Convention, and Art 147 of the Fourth Geneva Convention.

It was argued that the concept of "grave breaches" is the specific legal standard that generates UJ over war crimes.[164] This is due to the fact that the consequence of committing such grave breaches is considered as a violation of *jus cogens*. In fact, such violation will generate international obligations on all states to prevent the accused of going unpunished.[165] As provided under Geneva conventions in the common articles as follows:

> "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case".[166]

Accordingly, it was argued that taking legal action against these grave breaches are considered as *erga omnes* obligation.[167] In this regard, an international customary rule has emerged that considers UJ to be a means of fulfilling this obligation to bridge the impunity gap. In this matter, Bassiouni noted that UJ over war crimes is compatible with the analyses and writings of jurists and experts in international law.[168] Furthermore, he claimed that customary international law, which includes the practice of states, lacks clear examples of practice of UJ over war crime.[169] Accordingly, he claimed that the permissibility of the exercise of UJ over war crimes is mainly due to the writings of academics and experts.[170] Bassiouni argument concluded that "Notwithstanding the above, there is nothing in the Law of Armed Conflict that prohibits the national criminal jurisdiction from applying the theory of universality with respect to war crimes".[171]

[164] Petra Baumruk, (n 9),103.
[165] Malcolm Shaw, (n 30), 434-436.
[166] First Geneva Convention, (n 158), Art 49. Notably it is common to the four Geneva Conventions of 12 August 1949. See also Art 50 of the Second Geneva Convention, Art 129 of the Third Geneva Convention, and Art 146 of the Fourth Geneva Convention.
[167] Gabriel Bottini, (n 40), 510.
[168] Mahmoud Cherif Bassiouni, (n 10), 117.
[169] Ibid.
[170] Ibid.
[171] Ibid,118.

In this matter, Bassiouni's argument relating to the lack of examples of states' practice of UJ over war crime can be accepted[172] due to the fact that this argument was published in 2001.[173] However, as mentioned in the previous chapter, at the end of the 20th century and the beginning of the 21st century, international criminal law has witnessed an increase in the number of international tribunals, courts, and countries that have adopted UJ as a means of combating impunity for the most serious international crimes.[174] In this matter, a significant number of states have allowed UJ in their legal system over war crimes.[175] So, there is no longer any doubt about the emergence of an international customary rule authorising the exercise of UJ over war crime if the accused is present in the territory of the state. This issue will be discussed in more detail in the following chapter.

Maria Eriksson noted that "is it only the grave breaches provision that warrants universal jurisdiction in the 1949 Geneva Conventions?"[176] Indeed, Professor Meron claimed that the Geneva Convention dealt with the obligation of *aut dedere aut judicare* when "grave breaches" are committed, on the basis of which, he believes, UJ over war crimes has been recognised.[177] In addition, Professor Meron answered the above-mentioned question as he believed that the exercise of UJ is not limited to "grave breaches", but that the other serious violations of the Geneva Conventions could be punished by another state party to the Conventions.[178] As Michael Scharf argues, "numerous law of war experts have pointed out, the distinction between "grave breaches" and other violations of the Geneva Conventions is that there is a universal obligation to prosecute those accused of grave breaches and a universal right to prosecute those who have committed other violation".[179] In other words, in

[172] Ibid.
[173] Ibid.
[174] See chapter four at 4.2.1.1: The adoption of the universal jurisdiction expressly under national legislation. See also William A. Schabas, *An Introduction to the International Criminal Court*, (2edn, Cambridge University Press, 2004) 20; Bruce Broomhall, 'The International Criminal Court: A Checklist for National Implementation', (1999) 13 quater, Nouvelles etudes pénales 113; S. Rama Rao, 'Financing of the Court, Assembly of States Parties and the Preparatory Commission', in Lee, The International Criminal Court, 414–20.
[175] See chapter 4, according to the study carried out by this research, there are about 46 out of 72 countries (the sample studied by the research) adopted the universal jurisdiction in their national legislation. In addition, it was observed that there are about 43 out of 46 countries that considered war crimes to be a subject of universal jurisdiction.
[176] Maria Eriksson, *Defining Rape: Emerging Obligations for States Under International Law?,* (1st edn, Martinus Nijhoff Publishers, Boston, 2011) 447.
[177] Theodor Meron, 'International Criminalization of Internal Atrocities', (1995) 89 The American Journal of International Law 554, 569.
[178] Ibid.
[179] Michael Scharf, (n 72), 92.

the commission of the "grave breaches", there is universal obligation to prosecute, which states cannot evade. By contrast, he argues that in the commission of other serious violation there is right to exercise UJ not obligation to do so.[180]

Thus, "grave breaches" and other serious violations should be subject to UJ. However, it is unnecessary to separate UJ over war crimes into two categories, either as a duty or as a right, because UJ is always practised as a way of fulfilling an international obligation. Despite the fact that other serious violations of the Geneva Conventions and Additional Protocols are not traditionally subject to UJ, there is growing consensus that they should be.[181]

In this matter, a significant number of countries consider other serious violations of the Geneva Conventions and Additional Protocols as "grave breaches", because both are subject to UJ. It should be noted that the ICTY and ICTR have played a prominent role in this development.[182] For instance, in the Tadic case, the ICTY decided that it has jurisdiction with respect to grave or serious violations of Common Article 3, since customary international law imposes criminal responsibility for such violations.[183] Additionally, the Security Council has also explicitly authorised the ICTR to prosecute those accused of committing serious violations of Common Article 3 and Protocol II.[184] Furthermore, the statute of the ICC includes serious violations in internal armed conflicts under the jurisdiction of the court.[185] Consequently, the ILA argued that "It is difficult to see why domestic courts would not have the competence to try these same offences on the basis of universal jurisdiction".[186] Additionally, it was concluded that "grave breaches" and other serious violations are considered war crimes; so, both should subject to UJ.[187]

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[180] Ibid.

[181] Theodor Meron, (n 177), 554. See also, International Law Association, (n 37),6; Thomas Graditzky, 'Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-International Armed Conflicts', (1998) 322 International Review of the Red Cross 29, 40.

[182] International Law Association, (n 37), 6-7.

[183] Prosecutor v. Dusko Tadic, Appeals Chamber of the ICTY, 2 October 1995, para. 137, 35 ILM (1996) 32. See also International Law Association, (n 37), 7. See also Christa Meindersma, 'Violations of Common Article 3 of the Geneva Conventions as Violations of the Laws or Customs of War under Article 3 of the Statute of the International Criminal Tribunal for the Former Yugoslavia', (1995) 42 Netherlands International Law Review 375, 375- 376.

[184] ICTR Statute, (n 60), art 4.

[185] Rome Statute, (n 60), art 8(2)(c) and (e).

[186] International Law Association, (n 37), 6.

[187] Ibid. See also UN Commission on Human Rights Resolution on The Situation of Sierra Leone 1999/1, 6 April 1999.

Generally, it can be concluded that war crimes are considered as violation to *jus cogens*. Such violation will generate a legal obligation to take the necessary measures. In this matter, the exercise of UJ is considered such a measure[188] due to the fact that there is an international customary rule that considers war crimes to be subject to UJ. In this regard, the number of states that have adopted legislation based on this rule has increased significantly since the beginning of the 21st century. Accordingly, the practice of UJ over war crimes can be classified as a manifestation of the fulfilment of the *erga omnes* obligation.

3.3.4: Genocide

The crime of genocide was defined in 1948 under the Convention on the Prevention and Punishment of the Crime of Genocide:[189]

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.[190]

Accordingly, a crime will be considered genocide if the purpose behind the act was to destroy all members of a group only because they are members of that group.[191] Indeed, the acts of genocide provided under Article 2 also include killing or causing serious harm to members of

[188] Michael Scharf, (n 72), 87.
[189] Convention on the Prevention and Punishment of the Crime of Genocide, approved Dec. 9, 1948, S. TREATY Doc. No. 1, 81st Cong., 2d Sess., 78 U.N.T.S. 277 (registered Jan. 12, 1951) [hereinafter Genocide Convention].
[190] Ibid, art 2.
[191] Rome Statute, (n 60), art 6. See also Ademola Abass, 'Proving state responsibility for genocide: the ICJ in Bosnia v. Serbia and the International Commission of Inquiry for Darfur', (2008) 31 Fordham International Law Journal 871, 882.

the group.[192] Another example of an act of genocide, included in Article 2(d), is that of "imposing measures intended to prevent births within the group".[193] It should be noted that genocide involves acts that lead to the destruction of whole or part of a national, religious, racial or ethnic group.[194] Accordingly, the victim groups should be classified under at least one of the four categories: national, ethnical, racial or religious.[195]

The definition of genocide does not include other groups, such as cultural and political groups, despite proposals to expand its scope to include the two aforementioned communities.[196] In addition, the perpetrator must intend to destroy in whole or in part one of the groups, in order for the act to be considered genocide.[197] This intention is the reason behind the classification of genocide as a crime of a high degree of gravity and one of the most serious international crimes.[198] Thus, it has been described as the crime of the crimes[199] and the ultimate crime.[200] Consequently, the prohibition of genocide has attained the condition of *jus cogens* and obligation *erga omnes* under international law.[201]

Furthermore, a number of jurists believe that States have the right to exercise UJ over the perpetrators of the crime of genocide based on the fact that the crime is subject to *jus cogens* and obligation *erga omnes* under international law.[202] A question that arises is whether the Genocide Convention, or any international convention, mentions the possibility of exercising UJ over the crime of genocide. The Convention notes under Article 6:

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[192] Genocide Convention, (n 189), Art 2(a).
[193] Ibid, Art 2(d).
[194] International Criminal Court, (n 160) at 1-4. See also Markus Wagner, (n 160), 423.
[195] William Schabas, *Genocide in International Law: The Crimes of Crimes*, (1st edn, Cambridge University Press, 2000) 70.
[196] Petra Baumruk, *(n 9),* 107
[197] Robert Cryer, *An Introduction to International Criminal Law and Procedure*, (2nd ed. Cambridge University Press, 2010) 203-204.
[198] William Schabas, (n 195), 380-385. See also Joseph Rikhof, 'Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity', in Morten Bergsmo (ed), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes,* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 71-73.
[199] William Schabas, (n 195), 70.
[200] Payam Akhavan, *Reducing Genocide to Law Definition, Meaning, and the Ultimate Crime*, (1st edn, Cambridge University Press, 2012) 35.
[201] William A. Schabas, Convention for the Prevention and Punishment of the Crime of Genocide, United Nations, 2008 United Nations Audio-visual Library of International Law, available at <http://legal.un.org/avl/ha/cppcg/cppcg.html>
[202] Mahmoud Cherif Bassiouni, (n 10), 121. See also William Schabas, (n 195), 444-445; Theodor Meron, (n 177), 569.

> Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction[203]

Accordingly, it appears that the Genocide Convention does not explicitly provide for the exercise of UJ.[204] In this context, William Schabas mentioned that "the Sixth Committee rejected universal jurisdiction and opted for territorial jurisdiction. With respect to international courts, the major question was creation of an international jurisdiction".[205] However, a significant number of commentators claim that UJ for genocide has been recognised by customary international law, although there is lack of state practice to support this argument.[206] For instance, Professor Meron argued that "it is increasingly recognized by leading commentators that the crime of genocide (despite the absence of a provision on universal jurisdiction in the Genocide Convention) may also be cause for prosecution by any stat".[207] Moreover, Bassiouni argued that although there was no explicit provision in conventional international law for the exercise of UJ over genocide and an absence of state practice,[208] the ICTY in the Tadic case considered it permissible to exercise UJ as "universal jurisdiction being nowadays acknowledged in the case of international crimes".[209] In addition, the ICTR confirmed the permissibility of UJ over the crime of genocide.[210] Furthermore, Michael Scharf argued that the UN Commission of Experts concerning Rwanda, the International Court of Justice and many courts in the USA have all recognised that genocide is classified as j*us cogens* under international law and concerns the international community as whole.[211] Interestingly, Michael Scharf mentioned that "genocide was the one crime for which the United States Delegation at Rome was willing to accept universal jurisdiction".[212]

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[203] Genocide Convention, (n 189), Art 6.
[204] Mahmoud Cherif Bassiouni, (n 10), 121.
[205] William Schabas, (n 195), 75.
[206] Mahmoud Cherif Bassiouni, (n 10), 121.
[207] Theodor Meron, (n 177), 569.
[208] Mahmoud Cherif Bassiouni, (n 10), 122.
[209] Prosecutor v. Dusko Tadic aka "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995, available at: http://www.refworld.org/cases,ICTY,47fdfb520.html [accessed 8 February 2018]
[210] Prosecutor v. Ntuyahaga, Decision on the Prosecutor's Motion to Withdraw the Indictment, Case No. ICTR-90-40-T (18 March 1999). See also Mahmoud Cherif Bassiouni, (n 10) 122.
[211] Michael Scharf, (n 72), 87
[212] Ibid.

The reasons behind considering genocide as subject to UJ are, firstly, the gravity of the crime;[213] and, secondly, the consideration of prevention of genocide as a subject of *jus cogens* and obligation *erga omnes* under international law.[214] Consequently, states have the authorisation to exercise UJ over those accused of committing such crimes, only when the perpetrators' state is unwilling or unable to take legal steps.[215] As a result, customary international law recognised the necessity of taking legal action against perpetrators of the crime of genocide, including the exercise of UJ.[216] Furthermore, there is an increasing recognition by states in their national laws of the possibility of exercising UJ over the crime of genocide.[217] For example, recently Argentina has embarked on exercising of UJ over the genocide crimes committed in Myanmar against the Rohingya.[218] It should be noted that Argentina may face a number of legal problems in this practice due to the absence of the accused on its soil. As explored in the fourth chapter, the exercise of UJ is conditional on the presence of the accused on the territory of the state, and most of the countries that attempted to exercise UJ in absentia have been unsuccessful.[219] Regardless of the problem of exercising UJ in absentia, which will be discussed in the next chapter, the bottom line in this sub-section is that genocide is subject to UJ because it violates *jus cogens*. Hence, customary international law recognised the necessity of taking legal action against perpetrators of the crime of genocide, including the exercise of UJ.[220]

[213] Petra Baumruk, (n 9), 107.
[214] Michael Scharf, (n 72), 87
[215] Petra Baumruk, (n 9), 107.
[216] Nicolaos Strapatsas, (n 40), 11.
[217] Gabriel Bottini, (n 40), 510.
[218] United Nations Human Rights Council, Report of the independent international fact-finding mission on Myanmar, UN. Doc. No. (A/HRC/42/50) 8 August 2019, para 23, at 6. See also Burmese Rohingya Organisation UK (BROUK), Argentinean judiciary moves closer to opening case against Myanmar over Rohingya genocide, (1st June 2020), availble at https://progressivevoicemyanmar.org/2020/06/01/argentinean-judiciary-moves-closer-to-opening-case-against-myanmar-over-rohingya-genocide/ [accessed 23rd June 2020]; Marta Bo, Crimes against the Rohingya: ICC Jurisdiction, Universal Jurisdiction in Argentina, and the Principle of Complementarity, December 23, 2019, Opinio Juris website, availble at http://opiniojuris.org/2019/12/23/crimes-against-the-rohingya-icc-jurisdiction-universal-jurisdiction-in-argentina-and-the-principle-of-complementarity/ [accessed 23rd June 2020].
[219] Dissenting opinion of Judge van den Wyngaert, (n 44), para 57-58, p30. See also Separate Opinion of President Guillaume, (n 104).
[220] Nicolaos Strapatsas, (n 40), 11.

3.3.5: Crimes Against Humanity

Crimes against humanity have been provided for since 1945 under Article 6(c) of the London Charter:

> Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[221]

Crimes against humanity were also defined under Article 5 of the ICTY Statute,[222] Article 3 of ICTR Statute,[223] and Article 7 of the ICC Statute,[224] all of which add rape, torture and imprisonment to the definition.[225] The ICC Statute under Article 7 provided that acts which constitute crimes against humanity include murder, enslavement, torture, rape and enforced prostitution.[226] Accordingly, acts must fall under the list of inhumane acts exclusively contained in Article 7 paragraph 1. Moreover, Article 7 specifies that these acts are classified as crimes against humanity when they are committed against a civilian population on purpose.[227] In addition, as noted in Article 7 paragraph 1, crimes against humanity must be committed as part of a widespread or systematic attack directed against a civilian population.[228] However, this criterion does not mean that individuals cannot commit crimes against humanity but individuals can only commit them when the crimes are part of a widespread or systematic attack and have a policy element behind them.[229] Because of that, widespread or systematic attacks for political purposes are the criteria of international jurisdiction because it works on transforming crimes from national crimes, such as murder or rape, to international crimes, as crimes against humanity.[230]

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[221] London Agreement, (n 60) art 6.
[222] ICTY Statute, (n 60) art 5.
[223] ICTR Statute, (n 60) art 3.
[224] Rome Statute, (n 60), art 7.
[225] Ibid.
[226] International Criminal Court, (n 160), 5-12.
[227] Rome Statute, (n 60), art 7 (1).
[228] Charles Chernor Jalloh, 'What makes a crime against humanity a crime against humanity', (2013) 28 American University International Law Review 381, 407-408. See also William A. Schabas, 'Crimes against humanity as a paradigm for international atrocity crimes', (2011) 20 Middle East Critique 253, 264.
[229] International Criminal Court, (n 160), 5-12.
[230] Rome Statute, (n 60), art 7. See also Charles Chernor Jalloh, (n 228), 409; William A. Schabas, (n 228) 264.

Interestingly, there are some similarities between genocide and crimes against humanity, though the former is narrower because it must only be committed against groups based on race, ethnicity or religion. In addition, unlike genocide, crimes against humanity should be committed pursuant to a state or organizational policy or in furtherance of this policy as mentioned under Article 7 paragraph 2.[231]

Regarding UJ, like genocide and war crimes, crimes against humanity lack explicit provisions under conventional international law to support the exercise of such jurisdiction.[232] However, like genocide and war crimes, crimes against humanity are widely accepted as being subject of obligation *erga omnes* under international law.[233] This is due to the fact that committing crimes against humanity is considered as violation of *jus cogens*. Accordingly, states, to fulfil their international obligations to prevent such crimes, may exercise UJ under international customary law.[234] Professor Meron highlighted that "It is now widely accepted that crimes against humanity (Article 3 of the Rwanda Statute) are subject to universal jurisdiction".[235] Furthermore, it was mentioned that as of 2009 there are eleven European and eight African state parties to the ICC have adopted legislation that allow the exercise of UJ over crimes against humanity.[236]

It is worth mention that, unlike genocide, crimes against humanity have not yet been codified under international convention.[237] Although, there is no special international convention covering crimes against humanity, since 2014 the International Law Commission (ILC) has decided to include the topic of crimes against humanity on its agenda.[238] Consequently, there are draft articles on crimes against humanity that have been adopted by ILC, and a resolution adopted by the General Assembly on 7 December 2017.[239] Article 7 [6] of the draft, entitled "Establishment of national jurisdiction", stated under paragraphs 2 and 3 that

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[231] Ibid, art 7. (2). See also Michael Scharf, (n 72), 88; Payam Akhavan, 'Reconciling Crimes Against Humanity with the Laws of War', (2008) 6 Journal of International Criminal Justice 21, 28-29.
[232] Malcolm Shaw, (n 30), 670-672.
[233] Mahmoud Cherif Bassiouni, (n 10),119.
[234] Michael Scharf, (n 72), 67. See also Mahmoud Cherif Bassiouni, 'International Crimes: Jus Cogens and Obligatio Erga Omnes', (1996) 59 Law and Contemporary Problems 63, 68
[235] Theodor Meron, (n 177), 569.
[236] International Law Commission, First Report on crimes against humanity, Special Rapporteur, Mr. Sean D. Murphy', in (2015), UN Doc. A/CN.4/680. 10 ILC (67th Session), 11.
[237] Petra Baumruk, *(n 9),* 104.
[238] Report of the International Law Commission, 66th session (2014), Doc. No. A/69/10, para 266, p. 265.
[239] UNGA Resolution, 72/116 on 7 December 2017, UN. Doc. No. A/RES/72/116.

2. Each State shall also take the necessary measures to establish its jurisdiction over the offences covered by the present draft articles in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite or surrender the person in accordance with the present draft articles.

3. The present draft articles do not exclude the exercise of any criminal jurisdiction established by a State in accordance with its national law. [240]

Though the text does not explicitly clarify the exercise of UJ, at the same time it does not introduce any restrictions that may limit its exercise. Accordingly, the states concerned may be willing to employ UJ over the perpetrators of crimes against humanity because there is nothing prevent them under the provisions of the present draft articles. Consequently, it can be claimed that the exercise of UJ over crimes against humanity is not mandatory, rather it is optional for a state if it wishes to exercise such jurisdiction in order to fulfil their international obligation.[241]

Based on the above argument, it can be concluded that the exercise of UJ over the crimes against humanity is permissible because the crimes, as noted above, are of the most serious nature in the international community.[242] In addition, international customary law recognises them as subject to obligation *erga omnes* due to the fact that committing crimes against humanity is considered to be a violation of *jus cogens*.[243]

3.3.6: The Crime of Torture

Torture during armed conflict has been internationally criminalized as a war crime.[244] Article 3 of the four Geneva Conventions prohibits "Outrages upon personal dignity, in particular humiliating and degrading treatment".[245] Furthermore, such acts are prohibited by Additional

[240] Draft Articles on Crimes against humanity, (n 141), art 7.
[241] Theodor Meron, (n 177), 569.
[242] Rome Statute, (n 60), preamble.
[243] Mahmoud Cherif Bassiouni, (n 10),119. See also Petra Baumruk, *(n 9),* 104.
[244] International Committee of the Red Cross, 'ICRC Policy on Torture and Cruel: Inhuman or Degrading Treatment Inflicted on Persons Deprived of Their Liberty', (2011) 93 International Review of the Red Cross 547, 550. See also Kevin Jon Heller, (n 61), 61
[245] First Geneva Convention, (n 158), Art 3 (1) (c).

Protocol (I) under Article 75/2 (a), (e) and Additional Protocol (II) under article 4/2 (a), (h).[246] Accordingly, torture during the armed conflicts is considered to be a war crime. The Rome Statute affirmed the criminalization of torture during armed conflict under Article 8 (2) (a) (ii).[247]

By contrast, torture during non-armed conflict is classified as a crime against humanity, if is committed extensively and systematically against civilians.[248] The Rome Statute, under article 7(1)(f), classifies torture as crime against humanity.[249] Furthermore, in the first reading of the Draft Texts of Crimes Against Humanity 2017, torture is classified by the ILC as one of the acts that constitute crimes against humanity.[250] Article 3 (1) of the Draft Articles adopted the same provision as article 7 (1) of the Rome Statute.[251] Torture is, therefore, considered a crime against humanity if committed as part of a widespread and systematic attack against civilians. Accordingly, UJ can be exercised over perpetrators of torture during armed conflict as a war crime, and during non-armed conflict if committed as part of a systematic and widespread attack against civilians, as crimes against humanity.

The question that arises is whether UJ can be exercised over torture when it is not part of a systematic attack against civilians. In this matter, Kevin Heller states that there is no legal dispute over the fact that torture is an international crime, as a war crime if it is committed during armed conflict or as a crime against humanity if is committed as part of a systematic and widespread attack against civilians.[252] However, he argues that considering torture at peacetime as an international crimes remains controversial and only a few scholars classify torture in peacetime as an international crime.[253]

[246] Protocol (I)Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, U.N. Doc. A/32/144, Annex I [hereinafter Protocol I]; See also Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609, U.N. Doc. A/32/144, Annex II.
[247] Rome Statute, (n 60), art 8 (2) (a) (ii).
[248] International Committee of the Red Cross, (n 244), 551. See also Kevin Jon Heller, (n 61), 61
[249] Rome Statute, (n 60), Art 7. (1) (f).
[250] Draft Articles on Crimes against humanity, (n 141), Art 3.
[251] Ibid. See also Rome Statute, (n 60), Art 7. (1) (f).
[252] Kevin Jon Heller, (n 61), 61.
[253] Ibid. See also Neil Boister, 'Transnational Criminal Law?', (2003)14 European Journal of International Law 953, 967.

However, torture has been criminalized as an international crime *per se* under the Convention Against Torture 1984.[254] To date, 166 states, or about 83% of the states of the world, have ratified the Convention against Torture.[255] Accordingly, the ICJ argued that "the prohibition of torture is part of customary international law and it has become a peremptory norm (jus cogens)".[256]

Torture is defined under article 1 of the Convention against Torture as follows:

> the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[257]

It is worth mentioning that the definition of torture does not require that the act of torture should be committed during an armed conflict or as part of a systematic and widespread attack against civilians. Therefore, it is clear that the Convention criminalises the act of torture *per se*. This view is confirmed by Article 2 (1) (2), which provide that

> *(1) Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.*
>
> *(2) No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.*[258]

[254] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, UN Doc. A/Res/39/46.

[255] See Status of Ratifications Interactive Dashboard, Convention Against Torture, available at http://indicators.ohchr.org/.

[256] Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, p. 457.

[257] Convention Against Torture and Other Cruel, (n 254), Art 1.

[258] Ibid, Art 2.

Accordingly, it can be argued that acts of torture are criminalized as an international crime by the Convention against Torture.[259]

Regarding UJ, there is no express provision in the Convention authorising the exercise of UJ over the perpetrators of the crime of torture.[260] However, it is argued that article 5 of the Convention Against Torture implicitly permits the exercise of UJ over the perpetrators of the crime of torture.[261] In fact, Article 5, paragraph 1, provides that any jurisdiction may be exercised in the event that those accused of committing the crime of torture are present in the territory of State.[262] Furthermore, Article 5, paragraph 2, does not exclude the exercise of any jurisdiction over the perpetrators of the crime of torture.[263] Accordingly, article 5 can be used to argue that the crime of torture is subject to UJ.[264]

On the other hand, Article 7 of the Convention stipulates that states should exercise criminal jurisdiction over those accused of committing the crime of torture or extradite them to other countries to do so.[265] It is worth mentioning that article 7 provides for the principle of *aut dedere aut judicare*, however, there is no clear mention to UJ.[266] Despite this, a number of scholars have relied on the provisions of Articles 5 and 7 to argue for the possibility of exercising UJ over the crime of torture.[267] In this matter, Article 5 does not exclude UJ, therefore the exercise of UJ over the crime of torture is permissible. Additionally, despite the lack of clear provision for UJ under article 7, there is no contradiction between the principle of *aut dedere aut judicare* and UJ, rather the principle of *aut dedere aut judicare* supports the exercise of UJ.[268]

Practically, states have recognised that UJ could be exercised over the crime of torture. For example, in the case of former President of Chile Augusto Pinochet, Spain considered torture

[259] UNGA Resolution, 63/166 on 18 December 2008, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/RES/63/166, para. 2.
[260] Mahmoud Cherif Bassiouni, (n 10), 123.
[261] Ibid.
[262] Convention Against Torture and Other Cruel, (n 254), Art 5 (1).
[263] Ibid, Art 5(2).
[264] Mahmoud Cherif Bassiouni, (n 10), 123.
[265] Convention Against Torture and Other Cruel, (n 254), Art 7.
[266] Mahmoud Cherif Bassiouni, (n 10), 124.
[267] Mahmoud Cherif Bassiouni, (n 10), 124. See also Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), (n 256), para 91, at 455.
[268] Pavel Caban, (n 6), 185. See also Fannie Lafontaine, (n 57), 1285.

as subject of the UJ.[269] In fact, the Spanish National Court issued an arrest warrant against Pinochet on allegations of committing crimes of torture in Chile during his rule of the country.[270] Based on this arrest warrant, the UK arrested him in 1998. The House of Lords confirmed that the crime of torture is subject to the exercise of UJ.[271]

Equally, in the case of the former Chadian President Habré, the International Court of Justice confirmed that torture is subject to UJ.[272] Therefore, the Extraordinary African Chambers was established within the Senegalese judicial system to support the exercise of UJ over Habré.[273] In this matter, the Statute of the Extraordinary African Chambers under article 4 included the crime of torture among the crimes to which UJ would be exercised in the Habré case.[274] Recently, the UN Human Rights Council have confirmed that the crime of torture is the subject of UJ, as their report urged the exercise of UJ in the case of the Saudi journalist Khashoggi, who was murdered in mysterious circumstances inside the Saudi Consulate in Istanbul.[275] In this regard, the report stressed that the crime of torture is a subject of UJ, because it is a violation of jus cogens.[276]

In light of the above analysis it can be concluded that acts of torture can be subject to UJ if these acts of torture are classified as a war crime or as a crime against humanity. On the other hand, there is some scepticism concerning the torture *per se* being subject to UJ. Despite these doubts, the reality has proven that the crime of torture may be the subject of UJ due to

[269] Máximo Langer, 'The diplomacy of universal jurisdiction: the political branches and the transnational prosecution of international crimes', (2011) 105 The American Journal of International Law 1, 37. See also Ignacio De la Rasilla, 'The Swan Song of Universal Jurisdiction in Spain', (2009) 5 International Criminal Law Review 777, 784.

[270] Human Rights Watch, The Extradition of General Augusto Pinochet, (October 14, 1999), available at http://www.hrw.org/news/1999/10/14/extradition-general-augusto-pinochet [accessed 12-12-2018].

[271] Christine M. Chinkin, "In Re Pinochet. United Kingdom House of Lords: Regina v. Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3), (1999) 93 American Journal of International Law 704.

[272] Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), (n 256), para 68, at 449; and para 74-75, at 451.

[273] Report of the UN Secretary-General, The Scope and Application of the Principle of Universal Jurisdiction, Seventy-second session, UN. Doc. No A/72/112 (22 June 2017) para 27, p.6.

[274] Statute of the Extraordinary African Chambers, (Unofficial translation by Human Rights Watch) September 2, 2013, art 3 available at https://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers [accessed 1 April 2019].

[275] United Nations Human Rights Council, Annex to the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Investigation into the unlawful death of Mr. Jamal Khashoggi, UN. Doc. No. A/HRC/41/CRP.1 (19 June 2019) para 429, p 86.

[276] Ibid.

the fact that the crime of torture is considered as violation of *jus cogens*.[277] Therefore, states to fulfil their international obligation are allowed to exercise UJ over those accused of committing such crimes. Additionally, there are implicit provisions in the Convention Against Torture, under articles 5 and 7, that permits the exercise of UJ over the crime of torture. Additionally, customary international law, supported by the practice of states, recognises the exercise of UJ over the crime of torture.

3.3.7: Environmental Destruction as a Subject of UJ

Environmental destruction has become one of the most serious threats to the future of humanity and the sustainability of life, and is no less serious than international crimes such as genocide and crimes against humanity.[278] Some believe that the deliberate destruction of the environment should be considered as one of the most serious crimes, requiring harsh penalties.[279] Accordingly, the ILC has given serious consideration to the issue of the international criminalisation of the deliberate destruction of the environment.[280]

The Office of the Prosecutor (OTP) of the ICC has recently interpreted that the destruction of the environment could be subject to the jurisdiction of the ICC. In this matter, the OTP classify the destruction of the environment at the time of the non-armed conflict as a crime against humanity if it is committed as part of a widespread or systematic attack directed against a civilian population.[281] Therefore, this section discusses the possibility of subjecting environmental destruction to UJ.

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[277] Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), (n 256), para 68, at 449; and para 74-75, at 451.

[278] Byung-Sun Cho, 'Emergence of an International Environmental Criminal Law?', (2000) 19 UCLA Journal of Environmental Law and Policy 11, 12-13. See also Lynn Rhodes, 'Environmental crime and civilization: Identification; impacts; threats and rapid response', (2018) 79 Comparative Civilizations Review 6, 6-8.

[279] Ibid, 15. See also Carole M. Billiet and Sandra Rousseau, 'How real is the threat of imprisonment for environmental crime?', (2014) 37 European Journal of Law and Economics 183, 187. See also Mohammed Saif-Alden Wattad, (n 62), 279-282.

[280] Yearbook of the ILC 1996, Vol. II (Part One) Doc. No. A/CN.4/SER.A/1996/Add.1 (Part 1). See Extract, Document on crimes against the environment, prepared by Mr. Christian Tomuschat, ILC(XLVIII)/DC/CRD.3, [27 March 1996], p. 17.

[281] Office of the Prosecutor of the ICC, (n 8), par 40,41.

To discuss this issue, the section provides a historical overview of the legal status of environmental destruction under international criminal law. Following which, it discusses the work of the ILC on the criminalisation of the wilful and severe destruction of the environment. Then, it highlights the ICC's consideration of the destruction of the environment as a crime against humanity that can be subject to UJ.[282]

Before the Second World War, the international community did not consider the environment as a legal concept.[283] The prohibition of using poisoned weapons provided in Article 23 of the Annex to the Convention on the Laws and Customs of War on Land 1907,[284] aimed to prevent harm from the use of such weapons during the war, and was not aimed at protecting the air or soil from dangerous long-term effects, that would, in the end, affect human health. Accordingly, it is clear that the international community has focused on banning acts that directly harm human beings, but they have not included acts that are harmful to the environment itself.[285] Hence, In the Nuremberg trial, there was no charges brought against the defendants for damage to the natural environment during World War II.[286]

After World War II, the international community sought to criminalise the destruction of the environment during armed conflict by considering such acts as war crimes.[287] It is worth mentioning that before 1976, there were no explicit provisions for criminalising destructive acts to the environment during armed conflict. In this matter, it was mentioned that

> it was not until 1976 that the protection of the environment as such was addressed in a treaty explicitly applicable in armed conflict. Older treaties made no reference to the environment and the only protection offered to was through property rights and natural resources.[288]

However, after 1976 there have been three international instruments to criminalise such acts. These international instruments include the Environmental Modification Convention

[282] Luigi Prosperi and Jacopo Terrosi, 'Embracing the 'Human factor', (2017) 15 Journal of International Criminal Justice 509, 510.
[283] Yearbook of the ILC 1996, (n 280), p 17. See also Antonio Cassese, *International Criminal Law*, (1st edn, Oxford University Press, 2003), 482-488.
[284] International Conferences (The Hague), (n 153).
[285] Yearbook of the ILC 1996, (n 280), p 17.
[286] Ibid.
[287] Mohammed Saif-Alden Wattad, (n 62), 280.
[288] International Law Commission, second report on the protection of the environment in relation to armed conflicts, Special Rapporteur Marie G. Jacobsson, Documents of 69th session, UN Doc. A/CN.4/685 (28 May 2015), para 120, pp 35.

(ENMOD) 1976, Additional Protocol I 1977 to the 1949 Geneva Conventions, and the Rome Statute 1998.[289] These prohibit and criminalise the destruction of the environment during armed conflict in the following articles: Article 1, paragraph 1, of the Environmental Modification Convention (ENMOD)1976.[290] Secondly, Article 35 and 55 of the Additional Protocol I to the 1949 Geneva Conventions 1977.[291] Finally, Article 8, paragraph 2 (b)(iv) of the Rome Statute.[292] For instance, Article 8, paragraph 2 (b)(iv) includes severe damage to the natural environment on the list of war crimes:

> Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.[293]

It is worth mentioning that the text was limited to damage of the environment during armed conflicts. However, it does not include the destruction of the environment during non-armed conflicts.[294] In fact, all the above-mentioned international instruments criminalise damage done to the environment during armed conflict only by considering such destruction a war crime.[295]

The ILC has given significant attention to the issue of the destruction of the environment during the non-armed conflict,[296] specifically in the Draft Code of Offences Against the Peace and Security of Mankind (DCOAPSM), which discusses the issue of wilful and severe destruction of the environment.[297]

[289] Ibid, para 124-132, pp 37-41.
[290] Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD), New York, 10 December 1976 (United Nations, Treaty Series, vol. 1108, p. 151 and depositary notification C.N.263.1978. No. 17119).
[291] Protocol I, (n 246), art 35 and 55.
[292] Rome Statute, (n 60), art 8, paragraph 2 (b)(iv).
[293] Ibid.
[294] International Law Commission, (n 288), para 131, pp 40.
[295] Mohammed Saif-Alden Wattad, (n 62), 281.
[296] Yearbook of the ILC 1996, (n 280), p 17-27.
[297] Ibid.

In this matter, it was suggested in 1986 that violations of environmental protection rules should be considered a crime against humanity.[298] Mr. Doudou Thiam, Special Rapporteur proposed to include the violations of the environmental protection rules on the list of the crimes against humanity under Article 12 as follows: "The following constitute crimes against humanity: […] 4. Any serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment".[299]

In 1991, the ILC, at its forty-third session, initially adopted the criminalisation of the wilful and severe destruction of the environment as a crime against humanity under Article 26.[300] The initial reading of the text stipulates that "[a]n individual who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced".[301] However, during the forty-seventh session of the ILC in 1995, Mr. Thiam excluded the text,[302] arguing that the time was not appropriate for the adoption of this text since states had not welcomed the proposal. In addition, it was argued that the adoption of such a text is an extension of the scope of the crimes tried by the Nuremberg Tribunal.[303]

It is worth mention that the history of codifying the DCOAPSM dates back to 1946 when the UN adopted resolution 95 (I), which affirmed the "Nuremberg Principles".[304] Then, a year later, the UN adopted resolution 177 (II), which requested the ILC to codify international crimes in accordance with the Nuremberg Principles.[305] Accordingly, it is clear that the criminalisation of the wilful destruction of the environment is an extension of the scope of the crimes tried by the Nuremberg Tribunal, so it was not mentioned in the final text of the

[298] Yearbook of the ILC 1986, Vol. II, Part One, thirty-eighth session, Doc. No. A/CN.4/SER.A/1986/Add.l (Part 1), pp 86. See Fourth report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur, DOCUMENT A/CN.4/398 [11 March 1986]
[299] Ibid
[300] Yearbook of the ILC 1991, vol. II (Part Two), forty-third session, Doc. No. A/CN.4/SER.A/1991/Add.l (Part 2) pp. 94–107.
[301] Ibid, 97.
[302] Yearbook of the ILC 1996, (n 280), p 17.
[303] Ibid.
[304] Mahmoud Cherif Bassiouni, 'The History of the Draft Code of Crimes against the Peace and Security of Mankind', (1993) 27 Israel Law Review 247, 247; UNGA Resolution 95(I), Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal, 11 December 1946, A/RES/95.
[305] Ibid, 248; UNGA Resolution 177 (II), Formulation of the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal, 21 November 1947, A/RES/177.

DCOAPSM.[306] In this matter, Mr. Tomuschat stressed in his report in 1996, that the Nuremburg Tribunal did not criminalize acts that were harmful to the environment independently but focused on criminalising acts that directly harmed the human being. Accordingly, the criminalization of deliberate destruction of the environment was not mentioned in the final text of the DCOAPSM which was adopted by the Commission in 1996.[307]

In 2016, the OTP of the ICC raised the issue of criminalising the destruction of the environment in times of non-armed conflict by classifying them as a crime against humanity.[308] Where the OTP considered that the destruction of the environment can be a component of crimes against humanity if it is committed as part of a widespread or systematic attack directed against a civilian population.[309]

In fact, the ICC has stated that it will begin to classify acts that lead to the destruction of the environment, misuse of natural resources and the illegal seizure of land from its owners as crimes against humanity.[310] This classification constitutes a quantum leap in the field of international environmental justice that pays attention to environmental destruction and puts them in the category of crimes against humanity regulated by the Rome Convention in under Article 7.[311]

As noted above, Article 7 of the Rome statue provides that the acts that are classified as crimes against humanity should be committed against a civilian population with intent.[312] In addition, as noted in Article 7 paragraph 1, crimes against humanity must be committed as part of a widespread or systematic attack directed against a civilian population.[313] Therefore, in order to apply Article 7 of the Rome Statute to the destruction of the environment, the

[306] Yearbook of the ILC 1996, (n 280), p 18.
[307] Ibid.
[308] Office of the Prosecutor of the ICC, (n 8).
[309] Donald K Anton, 'Adding a green focus: The Office of the Prosecutor of the International Criminal Court highlights the 'environment' in case selection and prioritisation', (2016) 31 Australian Environment Review 1, 3.
[310] Luigi Prosperi and Jacopo Terrosi, (n 282), 511.
[311] Ibid, 517.
[312] Rome Statute, (n 60), Art 7. (1).
[313] Charles Chernor Jalloh, (n 228), 407-408. See also William A. Schabas, (n 228) 264.

purpose of the environmental destruction should be aimed to attack a group of people by polluting the environment in which they live.[314]

Accordingly, it is clear that the ICC has not criminalised the destruction of the environment as an international crime *per se*. Rather, the criminalisation of the destruction of the environment at the time of non-armed conflict is classified as a crime against humanity.[315] It is worth mention that the draft articles on crimes against humanity adopted in 2017 do not mention environmental destruction.[316] Despite this fact, there is no legal obstacle under the draft articles to prevent it from applying the OTP's classification for the destruction of the environment as a crime against humanity if the above conditions are met.[317]

Regarding UJ, the question that arises is whether it is possible to exercise UJ over the destruction of the environment. Indeed, it was mentioned that UJ can be applied only if the conduct is criminalised by international law and a state is obligated to prosecute the criminals.[318] So, it can be argued that UJ can be exercised over the destruction of the environment as long as such destruction is classified as a war crimes or a crime against humanity.[319] This is due to the existence of international customary rules that consider war crimes and crimes against humanity as a subject of UJ. However, it would be incorrect to classify **any** destruction of the environment as a subject of UJ due to the absence of an explicit international provision criminalising the destruction of the environment as an international crime in itself.[320]

In this matter, the environmental pollution or destruction may have resulted from legitimate action under international law.[321] For example, the environmental pollution resulting from the peaceful use of nuclear energy. It is worth mentioning that such pollution can be subject

[314] Luigi Prosperi and Jacopo Terrosi, (n 282), 520.
[315] Ibid, 517.
[316] Draft Articles on Crimes against humanity, (n 141), art 3.
[317] Office of the Prosecutor of the ICC, (n 8) par 40,41. See also Charles Chernor Jalloh, (n 228), 407-408.
[318] Byung-Sun Cho, (n 278), 32.
[319] Luigi Prosperi and Jacopo Terrosi, (n 282), 517-520. See also Ryan Gilman, 'Expanding environmental justice after war: the need for universal jurisdiction over environmental war crimes', (2011) 22 Colorado Journal of International Environmental Law and Policy, 467.
[320] International Law Commission, (n 288), para 124-132, pp 37-41.
[321] Mohammed Saif-Alden Wattad, (n 62), 269-278.

to the state's responsibility under international law,[322] however, it could not be the subject of international criminalisation because of the absence of criminal intent (*Mens rea*).[323]

Furthermore, it could be difficult to prove criminal intent and the legal causation between the action and the destruction of the environment.[324] In fact, environmental pollution differs from traditional international crimes that often have tangible physical consequences in the outside world, such as murder and rape. The pollution of the environment is sometimes not followed by any immediate physical result.[325] In addition, the result may not be evident where environmental pollution occurs, such as pollution of rivers or international seas or radioactive pollution through nuclear power reactors, which is known as cross-border pollution.[326] Accordingly, not all instances of the destruction of the environment could be classified as an international crime. Thus, it is very difficult to consider any destruction of the environment as subject to UJ.

Hence, it can be concluded that the destruction of the environment is not criminalised as an international crime *per se*. However, at the time of armed conflict such destruction is classified as a war crime and at the time of non-armed conflict it is classified as a crime against humanity. Therefore, UJ cannot be exercised over all acts of destruction of the environment. However, UJ can be exercised over the destruction of the environment as long as such destruction is classified as a war crime or a crime against humanity.

3.3.8: Terrorism

Some international crimes have not reached the jus cogens level under international law, however, their founding instruments provide for UJ implicitly or explicitly.[327] Despite the multiplicity of these crimes, this research has tended to highlight one of the most prominent, dangerous and most controversial, namely the crime of terrorism.

[322] International Law Commission, (n 73).
[323] Mohammed Saif-Alden Wattad, (n 62), 276
[324] Byung-Sun Cho, (n 278), 21-22.
[325] Byung-Sun Cho, (n 278), 21-22.
[326] Yearbook of the ILC 2001, vol. II (Part Two), fifty-third session, Doc. No. A/CN.4/SER.A/2001/Add.1 (Part 2) See International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary harm from hazardous activities) pp. 144.
[327] Mahmoud Cherif Bassiouni, (n 10), 125.

The crime of terrorism concerns the international community as whole because it violates human rights in a manner that shocks the conscience of all humanity.[328] The principle *aut dedere, aut judicare* over the crime of terrorism is provided under regional treaties such as the 1977 European Convention on the Suppression of Terrorism.[329] In addition, it is provided under some international treaties such as the Convention on the Suppression of Unlawful Seizure of Aircraft 1970,[330] and the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 1984.[331] Regardless, it has been argued that "Not all of the authors are, however, in agreement as concerns the application of the principle (and obligation!) of aut dedere aut judicare to all crimes covered by the principle of universal jurisdiction".[332]

On the other hand, a significant number of scholars have argued that the terrorism is classified as an international crime.[333] Bassiouni claimed that acts of terrorism are not generally state-sponsored and are ordinarily committed by small groups and individuals. Consequently, the application of the principle of UJ over these acts is easier for states.[334] Moreover, the ILC noted that "terrorism practised in any form is universally accepted to be a criminal act".[335]

Accordingly, some national legislation has recognised the crime of terrorism as subject to UJ. For instance, Spanish law authorised the exercise of UJ over certain crimes committed outside Spain by non-Spanish nationals, and the crime of terrorism is one of those crimes.[336] In addition, the United States under the Third Restatement of the Foreign Relations Law,

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[328] Luz E. Nagle, 'Terrorism and Universal Jurisdiction: Opening a Pandora's Box?', (2011) 27 Georgia State University Law Review 339, 347.

[329] Council of Europe, European Convention on the Suppression of Terrorism, 27 January 1977, ETS No. 90. See also Isidoro Blanco Cordero, 'Universal Jurisdiction General Report' (2008) 79 Revue Internationale de Droit Pénal 59, 89-90.

[330] United Nations, Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, UN Treaty Series 1973.

[331] Convention Against Torture and Other Cruel, (n 254). See also Isidoro Blanco Cordero, (n 329), 89-90.

[332] Preliminary Report, (n 39).

[333] Kevin Jon Heller, (n 61), 1. See also Gabriel Bottini, (n 40), 540-543.

[334] Mahmoud Cherif Bassiouni, (n 10), 134.

[335] Yearbook of the ILC 1994, vol. II, (Part Two), forty-sixth session, Doc. No. A/CN.4/SER.A/1994/Add.l (Part 2). Draft Statute for an International Criminal Court with commentaries, para 21 and 41, [hereinafter, Draft Statute for ICC]

[336] Ley Orgánica 6/1985 del Poder Judicial, 1 July 1985 ("Law of 1985"), Article 23(4). Spanish legislation the Spanish Organic Law of Judicial Power. See also Fausto Pocar and Magali Maystre, 'The Principle of Complementarity: a Means Towards a More Pragmatic Enforcement of the Goal Pursued by Universal Jurisdiction?', in Morten Bergsmo (ed), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes*, (Oslo: Torkel Opsahl Academic EPublisher, 2010). 276. See also Dalila Hoover, (n 12), 76.

Paragraph 404, has recognised certain acts of terrorism as subject to UJ.[337] In fact, the United States has significantly extended extraterritorially of its jurisdiction for anti-terrorism purposes.[338]

As discussed, some scholars have relied on the crime of piracy to justify the exercise of UJ over the crime of terrorism. In addition, they have claimed that the crime of terrorism was based on the crime of piracy.[339] In this matter, Anthony J. Colangelo argued that "there is a powerful rejoinder made below to this objection specific to terrorism based on the offence of piracy".[340] However, it should be noted that there is a lack of a developed, uniform definition of terrorism at the international level, although there are some definitions of terrorism under regional conventions.[341] The ILC attributed the inability of the international community to find a common definition of terrorism on the fact that "some States insisted on regarding certain acts committed by liberation movements recognized by regional organizations and by the United Nations itself as acts of terrorism."[342]

Regardless, it is worth highlighting that criminal intent is the most important component distinguishing the crime of terrorism. Similar to the crime of genocide, which requires specific intent to destroy groups, criminal acts of terrorism also require specific intent.[343] In this context, the Security Council's definition in its resolution 1566 of the crime of terrorism states:[344]

> criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to

[337] Restatement, Third, Foreign Relations Law of the United States, (1987) 1 American Law Institute 1-488. 402 available at https://www.ali.org/publications/show/foreign-relations-law-united-states-rest/. See also Dalila Hoover, (n 12), 78.
[338] Anthony J. Colangelo, (n 34), 122.
[339] Ibid, 140-144.
[340] Ibid, 140.
[341] Draft Statute for ICC, (n 335), para 21 and 41. See also Ignacio de la Rasilla, 'An International Terrorism Court in nuce in the Age of International Adjudication' (2017) 1 Asian Yearbook of Human Rights and Humanitarian Law, 8.
[342] Yearbook of the ILC 1988, Vol. I, the fortieth session, Doc. No. A/CN.4/SER.A/1988, para 24, at 84.
[343] Robert Cryer, (n 197), 342.
[344] UN Security Council, Security Council resolution 1566 (2004) [concerning threats to international peace and security caused by terrorism], 8 October 2004, S/RES/1566 (2004).

> terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.[345]

Accordingly, the acts should be committed in order to terrorise the population and spread fear among of them to compel the government or the international community to do or refrain from doing an act.[346] However, this definition is one of the most prominent examples the issues facing the development of a uniform international definition,[347] because it is loose and its legal elements are unspecific,[348] which is contrary to the most important principle of criminal law: "*nulla poena sine lege*".[349]

In light of the above analysis, it can be claimed that it is difficult to achieve the necessary international unanimity to consider terrorism as a subject of UJ, especially in the absence of a specific definition.[350] Accordingly, the international community must work to find a unified definition of terrorism,[351] in order to obtain a consensus on whether this this crime can be the subject of UJ.

3.4: Summary

This chapter found that UJ lacks to a generally accepted definition under customary or conventional international law.[352] Therefore, the research highlighted the main elements of UJ, which have been drawn from various definitions of UJ, including UJ as an exception to traditional forms of jurisdiction as it does not require the traditional links of nationality or territory to be exercised.[353] The only link between the offence and the prosecuting state that could be required is the physical presence of the accused within the jurisdiction of the prosecuting state.[354]

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[345] Ibid.
[346] Malcolm Shaw, (n 30), 1163. See also Robert Cryer, (n 197), 342.
[347] Erin Creegan, 'A Permanent Hybrid Court for Terrorism', (2011) 26 American University International Law Review 237, 240.
[348] Robert Cryer, (n 197), 343.
[349] Shahram Dana, 'Beyond Retroactivity to Realizing Justice: a Theory on the Principle of Legality in International Criminal Law Sentencing', (2009) 99 The Journal of Criminal Law and Criminology 857, 858.
[350] Erin Creegan, (n 347), 240-241. See also Ignacio de la Rasilla, (n 341), 8.
[351] Anthony J. Colangelo, (n 9), 196.
[352] Dissenting opinion of judge van den wyngaert, (n 44). See also Mark A. Summers, (n 45), 89.
[353] Eberechi Ifeonu, (n 50), 163.
[354] International Law Association, (n 37), 2.

The second element of UJ is the exceptional nature of its legal scope because it is only supposed to be exercised over a limited number of crimes that are classified as a serious violation of *jus cogens* under international law.[355] For instance, the crime of piracy is undisputed as having UJ because it is usually committed on the high seas where no state exercises sovereignty.[356] In addition, war crime are a second example of crimes that are subject to UJ, in view of their gravity and the seriousness of their consequences.[357] Therefore, such crimes are criminalised by international law and allow every state to exercise UJ over such crimes.[358]

The third element of UJ is the absence of an effective jurisdiction.[359] In fact, UJ is a secondary mechanism should be exercised only if the national and territorial states are unwilling or unable to exercise their criminal jurisdiction over international crimes.[360] Accordingly, UJ is defined here as follow: it is an exclusive criminal jurisdiction that can be exercised over those accused of committing a certain number of international crimes by national courts of any State on whose territory the accused is present, especially in the absence of an alternative effective jurisdiction.

Additionally, the chapter examined the international crimes subject to UJ,[361] which are limited into the crime of piracy, slavery, war crimes, genocide, crimes against humanity and torture. This chapter concludes that universal crimes should involve a criminal act that international law considers universally criminal.[362] Indeed, these crimes are universal because of the recognition of their grave nature by the international community.[363] In this regard, customary international law, which is based on state practice, considers the above-mentioned crimes as subject to UJ and subject of *jus cogens* and obligation *erga omnes*.[364] Accordingly, for states to fulfil their international obligation, they have the authorisation to exercise UJ

[355] Sienho Yee, (n 52), 504-505. See also Eberechi Ifeonu, (n 50), 161.
356 Petra Baumruk, (n 9), 42-48. See also, Tamsin Paige, (n 53), 144.
[357] Roger O'Keefe, (n 54), 812.
[358] Claus Kreb, (n 33), 3-4.
[359] Xavier Philippe, (n 56), 379. See also, Cedric Ryngaert, (n 56), 65.
[360] Claus Kreb, (n 33), 580. See also Fannie Lafontaine, (n 57), 1286.
[361] Sienho Yee, (n 52), 504.
[362] Kevin Jon Heller, (n 61), 1. See also Mohammed Saif-Alden Wattad, (n 62), 270.
[363] Michael Scharf, (n 72), 79.
[364] Ibid, 87.

over the accused, but only when the perpetrators' states and state of territorial jurisdiction are unwilling or unable to do so.

It should be noted that the nature of the crime alone is not sufficient to consider the crime subject to UJ. In fact, there is a need for a provision under international law that considers the crime to be subject to UJ. Thus, there must be an international custom that supports consideration of UJ over the perpetrators of such crimes as a form of fulfilling erga omnes obligation.[365]

The chapter also discussed some serious criminal acts that are not considered by customary international law to be among the crimes that are subject to UJ. In this matter, the research examined the possibility of exercising UJ over environmental destruction and the crime of terrorism. Despite the seriousness of the destruction of the environment and the crime of terrorism, they cannot be considered a subject of UJ.

Regarding the destruction of the environment, such destruction is not criminalised as an international crime *per se* under international law. However, it is classified at the time of armed conflict as a war crime and at the time of non-armed conflict it is classified as a crime against humanity. Therefore, UJ cannot be exercised over all destruction of the environment. However, UJ can be exercised over the destruction of the environment as long as such destruction is classified as a war crime or a crime against humanity.

Regarding terrorism, although it has not reached the *jus cogens* level under international law, it concerns the international community as whole because it violates the human rights of all humanity. Therefore, the research seeks to include terrorism as a subject of UJ. However, there is a lack of an international definition for the crime of terrorism, which has made it difficult to consider this crime as being subject to UJ.

[365] International Law Commission, (n 73) 113, Article 41(1). See also Robert Kolb, (n 73), 106.

Chapter Four: Universal jurisdiction (UJ) Under National Legislation and States' Practice of UJ within the Framework of Customary International Law

4.1: Introduction

In the preceding chapters, the research focused on a historical study of UJ and discussed the origin and evolution stages of this principle. In addition, it focused on defining the legal definition of the principle and discussed the most important crimes that can be subject to it. In light of this theoretical analyses it was made clear that the principle of UJ has been already recognised in international law. In addition, it was argued that there is no doubt about the existence of this principle as a legal principle under international law.[1]

In this matter, Amnesty argues that a significant number of states have recently stressed that they have a legal obligation to exercise UJ in cases of the most serious international crimes.[2] Additionally, it was mentioned that 166 states, almost 86% of the UN member states, have defined and criminalised in their national law one or more of the above mentioned international crimes which include genocide, war crimes and crimes against humanity.[3] Regarding UJ, almost 147 states have granted their national courts UJ over at least one of these crimes.[4]

As mentioned in previous chapters, following the World War II had the international community expanded the scope of UJ to include serious crimes. These crimes include war crimes, crimes against humanity and genocide, that are killed of millions of people.[5]

[1] Yearbook of the ILC 1996, vol. II (Part Two). Doc. No. A/CN 4/SER A/1996/Add1, at 28. See also Joseph Rikhof, 'Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity', in Morten Bergsmo (ed), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes,* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 69.
[2] Kevin Jon Heller, 'What Is an International Crime? (A Revisionist History)', (2017) 58 Harvard International Law Journal 355, 368.
[3] Amnesty International, 'Universal Jurisdiction Preliminary Survey of Legislation around the World – 2012 Update', Index: IOR 53/019/2012, October 2012, p. 1-2.
[4] Ibid, 2.
[5] Yana Shy Kraytman, 'Universal Jurisdiction – Historical Roots and Modern Implications', (2005) 2 Brussels Journal of International Studies 94, 103. See also Robert Cryer, *Prosecuting International Crimes Selectivity and the International Criminal Law Regime*, (1st edn, Cambridge University Press 2005) 30-36.

Consequently, many states have stressed a legal obligation to exercise UJ.[6] Hence, a significant number of states have adopted and exercised UJ.[7]

However, State practice of UJ has been challenged by legal and political issues, which has led the scope of UJ developing.[8] Initially, it was not clear whether such jurisdiction could be exercised in absentia. Thus, the practice of UJ was varied from State to State in accordance with historical and legal circumstance.[9] However, several States, including Belgium and Spain, have adopted UJ in absentia for serious crimes.[10] However, the practice of UJ in absentia has been criticised and led most states to require the presence of the accused in their territory.[11] Accordingly, the above mentioned challenges and criticisms have not led to the omission of UJ, but rather they have shown that specific conditions must be met before it can be exercised.

There are number of scholars who argue that UJ is not recognised under customary international law because there was no actual State practice that supported the existence of such jurisdiction over the most serious crimes.[12] Specifically, it was argued that what appears to be States' practice of UJ is no more than a verbal recognition from the States without any actual and effective practice.[13]

Therefore, the research in this chapter will examine States' practice of UJ and discuss the following points: firstly, whether the exercise of UJ over the most serious crimes exists as a rule of customary international law. Secondly, it will determine the preconditions for UJ that

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[6] Dalila Hoover, 'Universal jurisdiction not so universal: time to delegate to the International Criminal Court?', (2011) 8 Eyes on the International Criminal 73, 87

[7] Jana Panakova, 'Law and politics of universal jurisdiction', (2011) 3 Amsterdam law forum 49, 68-72. See also Ademola Abass, 'The International Criminal Court and Universal Jurisdiction', (2006) 6 International Criminal Law Review 349, 361.

[8] Olympia Bekou and Robert Cryer, 'The International Criminal Court and Universal Jurisdiction: A Close Encounter?', (2007) 56 International and Comparative Law Quarterly 49, 56.

[9] Dalila Hoover, (n 6), 89.

[10] Roger O'Keefe, 'The Grave Breaches Regime and Universal Jurisdiction', (2009) 7 Journal of International Criminal Justice 811, 814. See also Maximo Langer, 'Universal Jurisdiction is Not Disappearing: The Shift from 'Global Enforcer' to 'No Safe Haven' Universal Jurisdiction', (2015) 13 Journal of International Criminal Justice 245, 254-255.

[11] Pavel Caban, 'Universal Jurisdiction Under Customary International Law, International Conventions and Criminal Law of the Czech Republic: Comments', (2013) 4 Czech Yearbook of Public & Private International Law 173, 185.

[12] Matthew Garrod, *Rethinking the Protective Principle of Jurisdiction and Its Use in Response to International Terrorism*, (PhD Thesis University of Sussex,2015) 27-28.

[13] Matthew Garrod, 'Unravelling the Confused Relationship between Treaty Obligations to Extradite or Prosecute and Universal Jurisdiction in the Light of the Habre Case', (2018) 59 Harvard International Law journal 125, 195.

are required in accordance with the States' practice. In this matter, the research will draw from States' practice. Thirdly, it will highlight the difficulties that have faced states when they have practiced UJ. By so doing, the chapter aims to take lessons from States experience in order to develop possible codification of UJ.

Accordingly, this chapter examines states' recognition and practice of UJ across different continents. It is worth mentioning that the research aims to analyse the criminal jurisdiction of the largest possible number of states in order to ascertain the acceptability of UJ. In this regard, the research samples 72 states, covering a range of legal systems.[14] It is worth noting that the research in this section is based on national legislation, judicial decisions of national courts, the observations of these states before the Sixth Committee of the United Nations, reports of the UN General Assembly, reports of the Sixth Committee of the UN, reports of the Amnesty International, as well as academic scholarship.

4.2: Examining the Validity of Considering Customary International Law as the Legal Basis for UJ

Recently, many states have stressed that they have a legal obligation to exercise UJ in cases of the most serious crimes.[15] A significant number of states, such as Spain, France, Germany Senegal and South Africa, have adopted and exercised UJ.[16] However, the states differ in their adoption of UJ in their national legislation;[17] some have adopted UJ expressly under their national legislation and practised it whereas others merely recognise the principle of UJ without any actual exercise in their legal system.

[14] The research chooses 72 states from the five continents as follows***: African States*** *(Algeria, Burundi, Republic of the Congo, Egypt, Ghana, Kenya, Mauritius, Morocco, Nigeria, Senegal, South Africa, Tanzania, Tunisia).* ***Western European and Other States*** *(Austria, Belgium, Canada, Cyprus, Denmark, Finland, France, Germany, Greece, Ireland, Italy, New Zealand, Norway, Spain, Swaziland, Sweden, Switzerland, The Netherlands, United Kingdom, United States).* ***Eastern European States*** *(Belarus, Bulgaria, Czech Republic, Poland, Russia, Slovakia, Slovenia).* ***Latin American and Caribbean States*** *(Argentina, Bahamas, Brazil, Colombia, Costa Rica, Cuba, El Salvador, Guatemala, Jamaica, Mexico, Peru, Venezuela).* ***Asia-Pacific States*** *(Azerbaijan, Australia, Bahrain, Bangladesh, China, India, Indonesia, Iraq, Iran, Israel, Japan, Jordan, Kazakhstan, Kuwait, Malaysia, Qatar, Republic of Korea, Singapore, Saudi Arabia, Sri Lanka, Thailand).*

[15] Dalila Hoover, (n 6), 87

[16] Jana Panakova, (n 7), 49-72. See also Ademola Abass, (n 7), 361.

[17] Report of the UN Secretary-General, The Scope and Application of the Principle of Universal Jurisdiction, Sixty-fifth session, UN. Doc. No A/65/181 (29 July 2010), para 16-17, p. 6. See also Rephael Ben-Ari, 'Universal jurisdiction: chronicle of a death foretold?', (2015) 43 Denver Journal of International Law and Policy 165, 169-170.

In light of the this the research will consider customary international law as legal basis to UJ. In this regard, the research will firstly provide some examples for each category that show the legal position of a representative sample of states on UJ. After that the research will examine the existence of the two constituent elements of customary international law in the context of UJ: *opinio juris* and state practice.

4.2.1: States' Approaches to Adopting UJ in Their Legal Systems

As mentioned above, most of states have adopted UJ expressly under their national legislation. In addition, some states have adopted UJ implicitly under their national legislation. On the other hand, some merely recognise the principle of UJ without any actual exercise in their legal system. The reasons for this are explored in the following subsections.

4.2.1.1: The Adoption of UJ Expressly under National Legislation

By analysing States' practice of UJ, it was observed that there are number of states allow the exercise of UJ expressly under their domestic legislation.[18] The research found that 46 out of the 72 states have explicitly adopted UJ in their national legislation. In this matter, the most important observations about them can be listed in the following points:

4.2.1.1.1. The Increase in States' Adoption of UJ as a Means to Combat Impunity

The adoption of UJ in national legislation has increased significantly since the late 1990s and early 2000s. Almost 38 states out of the 46 states have allowed UJ in their legal system since that time. The reason for this remarkable increase could be attributed to the increase in international awareness of the need to combat impunity, especially after the establishment of a number of international courts such as the ICTY, ICTR and ICC.[19] It is worth mentioning that there is no provision under the statute of the ICTY, ICTR and ICC that allows the exercise of UJ.[20] However, the establishment of the international

[18] The universal jurisdiction has expressly adopted by 46 states out of 72 under their national legislation which includes: *(Burundi, South Africa, Republic of the Congo, Ghana, Kenya, Mauritius, Senegal, Belgium, Canada, Cyprus, Denmark, Finland, France, Germany, Greece, Ireland, Italy, New Zealand, Norway, Spain, Sweden, Switzerland, The Netherlands, United Kingdom, United States, Belarus, Bulgaria, Czech Republic, Poland, Russia, Slovakia, Slovenia, Brazil, Chile, Costa Rica, Cuba, El Salvador, Guatemala, Mexico, Venezuela, Australia, Israel, Azerbaijan , Iraq, Kazakhstan, Sri Lanka).*

[19] Statute for the (ICTY) International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. S/RES/827 (1993) (amended 1998), reprinted in 32 I.L.M. 1192 (1993), [hereinafter ICTY Statute]. See also Statute for the (ICTR) International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1598 (1994), [hereinafter ICTR Statute]; Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (amended 2010) [hereinafter Rome Statute].

[20] Rome Statute, (n 19), Preamble.

courts has played a prominent role in encouraging States to adopt national legislation, allowing the exercise of UJ over the most serious crimes in their national legal system.

As an example of the international awareness about the role of UJ in bridging the impunity gap, the Secretary-General of the UN recommended that the Security Council urge states to adopt UJ:

> *Urge Member States to adopt national legislation for the prosecution of individuals responsible for genocide, crimes against humanity and war crimes. Member States should initiate prosecution of persons under their authority or on their territory for grave breaches of international humanitarian law on the basis of the principle of universal jurisdiction and report thereon to the Security Council.*[21]

Although the Security Council did not adopt such a decision, this recommendation demonstrates remarkable international awareness about the role of UJ in closing the impunity gap. Arguably, the international awareness of bridging the impunity gap increased during this period, as reflected in the development of countries 'adoption of UJ.

For instance, the French legal system prior to the establishment of the ICTY and ICTR had not provided UJ in cases of war crimes, crime against humanity and genocide. This legal deficit was partially addressed by the adoption of two laws on the activation of the principle of UJ for crimes against humanity, war crimes and genocide.[22] The first law was adopted on 2 January 1995 to amend French legislation in conformity with Security Council resolution 827, which established an international tribunal to prosecute perpetrators of crimes in the former Yugoslavia.[23] The second law was passed on 22 May 1996 to implement Security Council resolution 955 on the establishment of an international tribunal for crimes committed in Rwanda.[24] However, these laws relate only to the international crimes committed in the

[21] Report of the UN Secretary-General, The Security Council on the Protection of Civilians in Armed Conflict, UN Doc. S/1999/57, 8 September 1999.

[22] Human Rights Watch, The Legal Framework for Universal Jurisdiction in France, 2014, available at<https://www.hrw.org/sites/default/files/related_material/IJ0914France_3.pdf> [accessed 20/7/2018].

[23] Law No. 95-1 of 2 January 1995 adapting French legislation to the provisions of United Nations Security Council Resolution 827 establishing an international tribunal to try persons alleged to be responsible for serious violations of international humanitarian law committed on the territory of the former Yugoslavia since 1991. NOR: JUSX9500141L, consolidated version on 13 July 2001, available at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000742868. See also Report of the UN Secretary-General, The scope and application of the principle of universal jurisdiction, Sixty-sixth session, UN. Doc. No. A/66/93 (20 June 2011).

[24] Law No. 96-432 of 22 May 1996 adapting French legislation to the provisions of United Nations Security Council Resolution 955 establishing an international tribunal to try persons presumed responsible for genocide or other acts serious violations of international humanitarian law committed in 1994 in the territory of Rwanda and, in

former Yugoslavia and Rwanda.[25] This restriction on the exercise of the principle of UJ under French legislation was criticised after the establishment of the ICC. Consequently, the French Code of criminal procedure on 9th of August 2010 was amended to comply with the ICC Statute and also to extend the criminal jurisdiction of French national courts to include crimes against humanity, genocide and war crimes.[26]

4.2.1.1.2: The Widespread Adoption of UJ

The explicit adoption of UJ under national legislations was not limited to states from a specific continent, but rather was adopted by states from multiple continents. Indeed, this widespread adoption of UJ as a means to combat impunity goes against the view that UJ is a Western concept as it is enshrined in the domestic legislation of numerous countries across the world.[27] In this regard, the research analyses two countries, in particular, one from Africa and other from Asia, as an example of the widespread adoption.

Firstly, South Africa has adopted UJ explicitly in their national legislation. In this matter, it was argued that based on customary international law, UJ at the domestic level is applicable to war crimes, crimes against humanity and genocide.[28] Due to the fact that customary international law is generally part of a law in South Africa as long as it is in conformity with the Constitution or laws passed by the legislature.

Furthermore, in 2002, South Africa adopted the ICC Act to implement the provisions of the Rome Statute by criminalising international crimes and allowing the exercise of UJ over

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the case of Rwandan citizens, on the territory of neighbouring States NOR: JUSX9500141L, consolidated version on 13 July 2001, available at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000742868. See also Mahmoud Cherif Bassiouni, 'Universal jurisdiction for international crimes: historical perspectives and contemporary practice', (2001) 42 Virginia Journal of International Law 81, 140.

[25] Human Rights Watch, (n 22).

[26] See Law n° 2010-930 of 9 August 2010 amending the Criminal Code and the Code of Criminal Procedure on the Adaptation of the French Criminal Law to the Rome Statute and particularly the Article 689-11 introduced by this Law. See also Observations by Permanent Mission of France to the UN on the scope and application of the principle of universal jurisdiction, at the 65th session, the Sixth Committee of UN (2010), available at < http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/France_E.pdf> [accessed 20/7/2020].

[27] AU–EU Technical Ad hoc Expert Group Report on the Principle of Universal Jurisdiction, Council of The European Union, Brussels, (April 16, 2009), Doc. No. 8672/1/09 REV 1, see para. 16-17 and 19, [hereinafter AU–EU Expert Report]. See also Martin Mennecke, 'The African Union and Universal Jurisdiction', in Charles Chernor Jalloh and Ilias Bantekas (eds), *The International Criminal Court and Africa*, (1st edn, Oxford University Press, 2017) 17.

[28] Report of the UN Secretary-General, (n 17), para 31-31, p. 9.

perpetrators of such crimes.[29] In fact, the Act considers war crimes, crimes against humanity and the crime of genocide as coming under the ambit of UJ.[30] It is worth noting that the exercise of UJ in South Africa requires the presence of the alleged offender in the territory of the State at the commencement of proceedings.[31] As stated under Section 4 (3) (c) of the ICC Act that "person, after the commission of the crime, is present in the territory of the Republic"[32]

Regarding the practical exercising of UJ, the South Africa's Supreme Court of Appeals on 27th of November 2013 ordered the South African Police Service (SAPS) to investigate Zimbabwean officials accused of crime against humanity in their country.[33] The case was brought to the Supreme Court of Appeals after the Zimbabwean officials were accused of torturing members of Zimbabwe's opposition party in March 2007. The case was submitted by Southern African Human Rights Litigation Centre (SALC).[34]

Subsequently, the SAPS appealed the Court diction by arguing that the court was not required to investigate the perpetrators of alleged crimes who are not currently present in the country.[35] However, as noted above on 30th of October 2014 the appeal was dismissed by the Constitutional Court that confirmed the validity of the Court of Appeal decision.[36] In fact, the Constitutional Court concluded that "the SAPS must investigate the complaint because under the Constitution, the ICC Act and South Africa's international law obligations, the SAPS has a duty to investigate the crimes against humanity of torture allegedly committed in Zimbabwe".[37] In other words, the investigation of crimes allegedly committed in Zimbabwe

[29] Implementation of the Rome Statute of the International Criminal Court Act, 2002, Republic of South Africa Government Gazette Vol. 445 Cape Town 18 July 2002 No. 23642.
[30] Ibid. See also Max du Plessis, 'South Africa's Implementation of the ICC Statute', (2007) 5 Journal of International Criminal Justice 460, 465-470.
[31] Fannie Lafontaine, 'Universal Jurisdiction the Realistic Utopia', (2012) 10 Journal of International Criminal Justice 1277, 1280-1284.
[32] Implementation of the Rome Statute of the International Criminal Court Act, (n 29).
[33] Maximo Langer, (n 10), 252.
[34] South Africa: High Court, Southern African Litigation Centre and Zimbabwe Exiles Forum v. National Director of Public Prosecutions and three others, Case Number: 77150/09, 8 May 2012, available at http://www.refworld.org/cases,ZAF_HC,4fad28f52.html [accessed 27 July 2019]
[35] Constitutional Court of South Africa, National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another, CCT 02/14 Date of judgment:30 October 2014, available at <http://www.saflii.org/za/cases/ZACC/2014/30.html> [accessed 27 July 2019].
[36] Ibid.
[37] Ibid.

is appropriate use of UJ.[38] This judgment is significant as it sets the precedent of legal obligation to exercise UJ in the investigation of international crimes.[39]

In general, it can be concluded that UJ could be exercised in South Africa over war crimes, crimes against humanity and the crime of genocide.[40] However, it is restricted by the need for the presence of the accused in the territory of South Africa.[41] However, the possibility of the subsequent presence in the territory of the State is sufficient to exercise UJ.[42] Thus, UJ can be exercised in absentia, as long as there is a possibility of entry for accused to the South African territory.[43] This issue will be further discussed in the third section related to discuss the preconditions for the exercise of UJ.

Azerbaijan is an example of an Asian country that has adopted UJ explicitly in their national legislation. The Criminal Code of Azerbaijan, which was adopted in 1999, allows the exercise of UJ.[44] In fact, the Code stresses that the peace and security of humanity is one of the most important goals of the criminal legislation.[45] For instance, Article 12 (3) provides that:

> Citizens of the Azerbaijan Republic, foreigners and persons without the citizenship, who have committed crimes against the peace and mankind's, war crimes, terrorism, financing of terrorism, stealing of an airship, capture of hostages, torture, a sea piracy, illegal circulation of narcotics and psychotropic substances, manufacturing or sale of false money, attack on persons or the organizations using the international protection, the crimes connected to radioactive materials, and also other crimes, punish of which stipulated in international agreements to which the Azerbaijan Republic is a party, shall be instituted to criminal liability and punishment under the Present Code, irrespective of a place of committing a crime.[46]

[38] Kevin Jon Heller, (n 2), 54.
[39] Maximo Langer, (n 10), 252.
[40] Amnesty International, (n 3), 105.
[41] Fannie Lafontaine, (n 31), 1280-1284.
[42] Kevin Jon Heller, (n 2), 54.
[43] Constitutional Court of South Africa, (n 35). See also Fannie Lafontaine, (n 31), 1284.
[44] Report of the UN Secretary-General, (n 23), para 6, p. 3.
[45] Criminal Code of The Azerbaijan Republic 1999 (Approved by the Law of the Republic of Azerbaijan of 30 December 1999, No. 787-IQ. Effective since 1 September 2000 pursuant to the Law of the Republic of Azerbaijan of 26 May 2000, No. 886-IQ), Art 12(3), available at <https://www.legislationline.org/documents/section/criminal-codes/country/43/Austria/show> [accessed 31/7/2018]. See also Observations by Azerbaijan to the United Nations on the scope and application of the principle of universal jurisdiction, at the 66th session, the Sixth Committee of UN, (2011), available at<http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Azerbaijan%20(R%20to%20E).pdf> [accessed 20/7/2020]
[46] Ibid.

Accordingly, it is clear that Azerbaijani law allows the exercise of UJ in cases of crimes against humanity, war crimes and other offences derived from international agreements.[47] However, it has expanded the scope of UJ to include some crimes that are not internationally accepted to be subject to UJ, such as sale of false money. Nevertheless, to date, no case has arisen before the Azerbaijani national judiciary regarding the exercise of UJ. In this matter, the Permanent Mission of Azerbaijan to the United Nations confirmed that no criminal proceedings have been initiated against perpetrators of international crimes in Azerbaijan. Accordingly, no one has been convicted by exercising UJ in Azerbaijan.[48]

4.2.1.1.3: The Position of States on the Scope of UJ

Despite the significant adoption of UJ, there is a difference between states in defining the scope of UJ.[49] For instance, significant number of states have limited the scope of UJ to crimes of piracy, torture, war crimes, genocide and crimes against humanity. In contrast, some states have extended the scope of UJ by including some domestic crimes affecting their security and sovereignty.

Ghana can be used as an example. According to Section 56 of Courts Act 1993 (ACT 459),[50] the Ghanaian national courts are allowed to exercise UJ over some domestic crimes. For example, the exercise of UJ is allowed over "any offence against the property of the Republic"[51] and "any offence against the security, territorial integrity or political independence of the Republic."[52] Accordingly, it is clear that the scope of UJ has been expanded under Ghanaian national legislation by including some domestic crimes. Such an expansion is controversial because there are no international rules allow exercising UJ over such domestic crimes.

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[47] Report of the UN Secretary-General, The scope and application of the principle of universal jurisdiction, Seventy session, UN. Doc. No. A/70/125 (1 July 2015), para 11-13, p. 3.

[48] Observations by Azerbaijan to the United Nations on the scope and application of the principle of universal jurisdiction, at the 65th session the Sixth Committee of UN, (2010), available at<http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Azerbaijan_E.pdf> [accessed 20/7/2020]. See also Xing Yun, 'Asia's Reticence Towards Universal Jurisdiction', (2016) 4 Groningen Journal of International Law 54, 56.

[49] Amnesty International, (n 3), 12-16.

[50] Courts Act,1993 (Act 459), as amended by (Act 620) 2002, Ghana Official Gazette 1993-07-06 (GHA-1993-L-34186) Courts Act (No. 459 of 1993), available at <http://www.wipo.int/wipolex/en/text.jsp?file_id=344815> [accessed 20/8/2019]. See also Observations by Ghana to the United Nations on the scope and application of the principle of universal jurisdiction, at the 67th session, the Sixth Committee of UN, (2012), available at <http://www.un.org/en/ga/sixth/67/ScopeAppUniJuri/Ghana_Eng.pdf> [accessed 20 July 2020].

[51] Ibid, sec 56 (4) (f).

[52] Ibid, sec 56 (4) (g).

On the other hand, states like Venezuela have limited the scope of UJ to a few crimes such as hijacking and piracy.[53] However, some crimes of international concern are not covered by UJ. For instance, war crimes and genocide are not covered by UJ in Venezuelan Law.[54] In this regard, the office of the Venezuelan prosecutor argued that the national courts in Venezuela cannot exercise such jurisdiction over war crimes.[55] In fact, this issue was raised when a criminal proceeding was initiated and requested the Venezuelan judiciary to exercise UJ over war crimes allegedly committed in Colombia by members of ELN[56] and FARC.[57] In this matter, the prosecutor claimed that there is a lack of internal legislation in Venezuela allowing the exercise of UJ. In addition, the prosecutor said that *"Therefore, until legislation regulating the application of the universal jurisdiction principle is introduced in the internal legal system, Venezuelan juridical bodies cannot open investigations against individuals not present on Venezuelan territory"*.[58]

In general, although some countries have extended the scope of UJ to include some ordinary crimes, most countries share the view that the scope of UJ includes only the following crimes: piracy, slavery, war crimes, genocide, crimes against humanity and torture.[59] In fact, the common factor among the above-mentioned crimes is that such crimes constitute a violation of *jus cogens*.[60] This violation generates an international obligation toward all States to take the necessary legal procedures against the perpetrators of these crimes.[61] In this matter, State practice has shown that UJ is considered a form of fulfilment of this obligation if the accused is present in the territory of the state. The following table shows the position of national legislations of the 46 states on the adoption of UJ over these crimes.[62]

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[53] Amnesty International, 'Venezuela: End Impunity Through Universal Jurisdiction', No Safe Haven Series No. 5, December 2009, Index: AMR 53/006/2009, p. 7, available at <https://www.amnesty.org/en/documents/AMR53/006/2009/en/> [Accessed 29/7/2019].
[54] Ibid, 27.
[55] Ibid, 7.
[56] (Ejército de Liberación Nacional) The National Liberation Army Colombia
[57] (Fuerzas Armadas Revolucionarias de Colombia) The Revolutionary Armed Forces of Colombia
[58] Decisión de la Fiscalia Sexta del Ministerio Publico a Nivel Nacional con competencia Plena a cargo de Maria Alejandra Perez G., C-115-2008, 07 February 2008. Translated to English by Amnesty International, (n 53), 27.
[59] Mahmoud Cherif Bassiouni, (n 24), 107.
[60] Rubin Alfred, 'Actio popularis, jus cogens and offenses erga omnes?', (2001) 35 New England Law Review 265, 277-278; Roger O'Keefe, (n 37) 811-812.
[61] Mahmoud Cherif Bassiouni, 'International Crimes: Jus Cogens and Obligatio Erga Omnes', (1996) 59 Law and Contemporary Problems 63, 63.
[62] Reports of the UN Secretary-General, The Scope and application of the principle of universal jurisdiction, U.N. Doc. A/65/181 (July 29, 2010); U.N. Doc. A/66/93 (June 20, 2011); U.N. Doc. A/66/93/Add. 1 (June 20, 2011);

	states	Piracy	Slavery	Genocide	War crimes	Crimes against humanity	Torture
1	Burundi	-	-	√	√	√	√
2	South Africa	√	√	√	√	√	-
3	Republic of the Congo	-	√	√	√	√	√
4	Ghana	√	√	√	√	√	-
5	Kenya	√	-	√	√	√	-
6	Mauritius	√	-	√	√	√	-
7	Senegal	√	√	√	√	√	√
8	Belgium	-	-	√	√	√	√
9	Canada	-	-	√	√	√	√
10	Cyprus	√		√	√	√	√
11	Denmark	-	-	√	√	√	√
12	Finland	-	-	√	√	√	√
13	France	-	-	√	√	√	√
14	Germany	-	-	√	√	√	-
15	Greece	√	-	-	-	√	√
16	Ireland	-	-	-	√	-	√
17	Italy	-	-	√	√	√	-
18	New Zealand	√	-	√	√	√	√
19	Norway	-	-	√	√	√	√
20	Spain	-	-	√	√	√	√
21	Sweden	-	-	√	√	√	√
22	Switzerland	-	-	√	√	√	-
23	The Netherlands	√	-	√	√	√	√
24	United Kingdom	√	-	-	√	-	-

U.N. Doc. A/67/116 (June 28, 2012); U.N. Doc. A/68/113 (June 26, 2013); U.N. Doc. A/69/174 (July 23, 2014); U.N. Doc. A/70/136 (July 14, 2015); U.N. Doc. A/71/111 (June 28, 2016); U.N. Doc. A/72/112 (June 22, 2017); U.N. Doc. A/73/123 (July 3, 2018); and U.N.Doc. A/74/144 (July 11, 2019). See also Amnesty International, (n 3); Máximo Langer, (n 71), 8-12; Matthew Garrod, (n 13), 169-172; Devika Hovell, (n 182); International Law Association, (n 95); AU–EU Expert Report, (n 27); Martin Mennecke, (n 27); ZHU Lijiang, (n 148), 217.

25	**United States**	**√**	**-**	**√**	**-**	**-**	**√**
26	**Belarus**	**√**	**√**	**√**	**√**	**√**	**√**
27	**Bulgaria**	**-**	**-**	**√**	**√**	**√**	**√**
28	**Czech Republic**	**-**	**-**	**√**	**√**	**√**	**√**
29	**Poland**	**-**	**-**	**√**	**√**	**√**	**√**
30	**Russia**	**√**	**-**	**√**	**√**	**-**	**-**
31	**Slovakia**	**√**	**√**	**√**	**√**	**√**	**√**
32	**Slovenia**	**√**	**√**	**√**	**√**	**√**	**√**
33	**Brazil**	**-**	**-**	**√**	**√**	**-**	**√**
34	**Chile**	**√**	**-**	**√**	**√**	**√**	**-**
35	**Costa Rica**	**-**	**-**	**√**	**√**	**√**	**√**
36	**Cuba**	**-**	**-**	**√**	**√**	**√**	**-**
37	**El Salvador**	**√**	**-**	**√**	**√**	**√**	**-**
38	**Guatemala**	**-**	**-**	**-**	**√**	**-**	**√**
39	**Mexico**	**-**	**-**	**-**	**√**	**√**	**√**
40	**Venezuela**	**√**	**-**	**-**	**-**	**-**	**√**
41	**Australia**	**√**	**√**	**√**	**√**	**√**	**√**
42	**Israel**	**-**	**-**	**√**	**√**	**√**	**-**
43	**Azerbaijan**	**-**	**-**	**√**	**√**	**√**	**√**
44	**Iraq**	**-**	**√**	**√**	**√**	**√**	**√**
45	**Kazakhstan**	**-**	**-**	**√**	**√**	**-**	**√**
46	**Sri Lanka**	**√**	**-**	**√**	**√**	**√**	**√**
*******		**19**	**8**	**40**	**43**	**38**	**33**

4.2.1.1.4: The Reluctance of States to Exercise UJ in an Absolute Manner

Some European states had provided flexible and absolute UJ before it was amended and restricted by some preconditions.[63] Belgium enacted laws in 1993 and 1999, allowing its national courts

[63] Amnesty International, Universal Jurisdiction: The Duty of States to Enact and Enforce Legislation: Chapter 2: The Evolution of The Practice of Universal Jurisdiction 31 August 2001, p, 58-60, available at https://www.amnesty.org/en/documents/document/?indexNumber=IOR53%2F004%2F2001&language=en [accessed on 9/11/2019].

to exercise UJ with unprecedented flexibility.[64] This legislation was very flexible in terms of the ease of exercising UJ. In the first place, the prosecution of international crimes could be initiated wherever the suspect is located, even if he was not present on Belgian territory.[65] In addition, it allowed victims or their representatives to file a lawsuit without waiting for the approval of the Attorney General.[66] It also stated that immunity cannot be an obstacle to prosecution and the arrest of suspects.[67]

In addition, Spain exercises flexible UJ expressly under its national legislation and is considered one of the leading countries in the prosecution of international criminals through the exercise of UJ[68] since it was stressed that the presence of a suspect on Spanish territory was not necessary to initiate proceedings before the court.[69] In this matter, Article 23, paragraph 4, of Organic Law No. 6/1985 provides for the possibility of national courts to prosecute perpetrators of genocide, terrorism and other crimes.[70] Furthermore, the Spanish Penal Code, since the ratification of the Convention against Torture in 1987, has considered the crime of torture to be the subject of UJ.[71] In addition, since 2004, crimes against humanity is considered under Spanish criminal law to be the subject of UJ.[72]

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[64] The Act of 16 June 1993 concerning the punishment of grave breaches of the Geneva Conventions of 12 August 1949 and their Additional Protocols I and II of 18 June 1977 (Official Journal of 05.08.1993, at 17751-17755). As modified by the Act of 10 February 1999 concerning the punishment of grave breaches of international humanitarian law (Official Journal of 23.03.1999, at 9286-9287) available at: https://www.refworld.org/docid/3ae6b5934.html [accessed 2 September 2019]. See also Jana Panakova, (n 7), 55.

[65] Observations by Belgium to the United Nations on the scope and application of the principle of universal jurisdiction, at the 65th session, the Sixth Committee of UN, (2010), available at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Belgium_E.pdf [accessed 15 July 2020]. See also Malvina Halberstam, 'Belgium's Universal Jurisdiction Law Vindication of International Justice or Pursuit of Politics', (2003) 25 Cardozo law review 247; Fannie Lafontaine, (n 31), 1280.

[66] Bruce Broomhall, 'Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law', (2001) 35 New England Law Review 399, 410.

[67] Malvina Halberstam, (n 65), 250

[68] Dalila Hoover, (n 6), 76.

[69] Sienho Yee, 'Universal Jurisdiction: Concept, Logic, and Reality', (2011)10 Chinese Journal of International Law 503, 521. See also Maximo Langer, (n 10), 254-255.

[70] Organic Law 6/1985, Of 1 July, On the Judiciary, art 23 (4). Ley Orgánica Nº 6/1985 de 1 de julio de 1985 del Poder Judicial, available at http://legislationline.org/download/action/download/id/6791/file/Spain_law_juidiciary_1985_am2016_en.pdf [accessed 24 July 2019].

[71] Máximo Langer, 'The diplomacy of universal jurisdiction: the political branches and the transnational prosecution of international crimes', (2011) 105 The American Journal of International Law 1, 37.

[72] Christopher Keith Hall, 'Universal Jurisdiction: New Uses for an Old Tool', in Mark Lattimer and Philippe Sands (eds), *Justice for Crimes Against Humanity*, (1st edn Oxford: Hart 2003) 50.

Such broad flexibility has been criticised and led to the adoption of certain preconditions to exercise UJ.[73] For instance, Belgium provided amendments on 5th of August 2003 to limit the exercise of UJ,[74] which requires there to be a link between the accused and Belgium.[75] Accordingly, the presence of the accused in Belgium is a necessary condition for the possibility of filing a lawsuit. In other words, the absence of the perpetrator on Belgian territory is an impediment to the proceedings and acceptance of the complaint.[76] In addition, Article 12a of the Preliminary Chapter of the Code of Criminal Procedure, requires approval of the Attorney General to exercise UJ.[77] Hence, it is not possible to initiate prosecution or even investigation without the request of the Attorney-General, who assesses the necessity to initiate the proceedings.[78] Finally, the new legislation provides that the suspect cannot be arrested if they are an official guest of the Government or a worker of an international organization located on Belgian territory.[79]

The situation in Spain is similar to that in Belgium due to the fact that the presence of the accused in Spain has become a necessary condition for the possibility of exercising UJ.[80] In 2009, the Spanish Senate adopted Law No. 1/2009, which obliges the judiciary to meet certain conditions before exercising UJ, including the necessity of having the suspect in Spain or the victims being Spanish nationals.[81]

It is worth mentioning that the flexibility of UJ was not allowed in all Europe states; some do not allow the exercise of UJ in absentia at any stage. For instance, French law does not permit absolute

[73] Pavel Caban, (n 11), 185. See also Fannie Lafontaine, (n 31), 1285.
[74] 2003 Criminal Code, New section I (a) of the Criminal Code (L. 5 August 2003) Article 136, unofficial translation in English by ICRC, available online on https://casebook.icrc.org/case-study/belgium-law-universal-jurisdiction. See also Jana Panakova, (n 7), 61.
[75] Katherine Gallagher, 'Universal Jurisdiction in Practice', (2009) 7 Journal of International Criminal justice 1087, 1113-1114.
[76] Máximo Langer, (n 71), 27.
[77] Ryan Rabinovitch, 'Universal Jurisdiction in Abstentia', (2004) 28 Fordham International Law Journal 500, 513.
[78] Máximo Langer, (n 71), 28.
[79] Sienho Yee, (n 69), 522.
[80] Observations by Permanent Mission of Spain to the UN on the scope and application of the principle of universal jurisdiction, 71st session, the Sixth Committee of UN, (2016), available at <http://www.un.org/en/ga/sixth/71/universal_jurisdiction/spain_e.pdf> [accessed 20 July 2020].
[81] Ley Orgánica del Poder Judicial 1985, Organic Law of the Judicial Power 1985 (as amended Judiciary Law 2009). See also Organic Law no. 5/2010 amending Organic Law 10/1995, of November 23, of the Criminal Code. Official State Gazette (Separata), 2010-06-23, no. 152, p. 54811-54883. (Ley Orgánica núm. 5/2010 por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal.Boletín Oficial del Estado (Separata), 2010-06-23, núm. 152, págs. 54811-54883, available online at https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=84103&p_count=100473&p_classification=01.04&p_classcount=2426. See also Maximo Langer, (n 10), 247.

UJ at any stage because the exercise of UJ is always conditional to the presence of the suspect in French territory.[82] Furthermore, French law requires that the suspect should have "habitual residence" on French territory.[83] This requirement means that if the suspects are present in France for a short period as tourists, they cannot be detained.[84] In fact, the requirement of "habitual residence" for the suspect in France has been criticised.[85] It was argued that the condition is inflated because the presence of the accused on French soil should be sufficient to practice UJ.[86]

Accordingly, the provision of UJ has gone through stages of evolution under national law in some states. Due to the fact that absolute UJ is allowed in these states. However, such absolute UJ was criticised, and the criticism led these states to develop some preconditions to practice UJ.[87] On the other hand, other states have not permitted absolute UJ at any stage because the exercise of UJ is always conditioned under their national law. The research will discuss the preconditions for the exercise of UJ in the next section of this chapter.

4.2.1.2: The Adoption of UJ Implicitly under National Legislation

A number of states have adopted UJ implicitly under their national legislation. In fact, nine states out of 72 have relied on the provisions of the Conventions directly in adopting UJ.[88] It is worth mentioning that there is no international convention that comprehensively governs the concept of UJ. However, it has been argued that there are some international conventions that recognise UJ implicitly.[89] For example, the four Geneva Conventions of 1949 implicitly provide the notion of UJ over grave breaches of those Conventions.

> "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own

[82] Ryan Rabinovitch, (n 77), 508.
[83] Rahim Hesenov, 'Universal Jurisdiction for International Crimes – A Case Study', (2013) 19 European Journal on Criminal Policy and Research 275, 282.
[84] Human Rights Watch, (n 22).
[85] See Law n° 2010-930 of 9 August 2010, (n 26). See also Report of the UN Secretary-General, (n 23).
[86] Human Rights Watch, (n 22).
[87] Pavel Caban, (n 11), 185. See also Fannie Lafontaine, (n 31), 1285.
[88] 9 states out of the 72 states have adopted universal jurisdiction implicitly under their national legislations which includes (Argentina, Austria, Swaziland, Colombia, Peru, Tunisia, Malaysia, Qatar, Republic of Korea).
[89] Robert Cryer, *An Introduction to International Criminal Law and Procedure*, (2nd ed. Cambridge University Press, 2010) 50.

legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case".[90]

In this matter, it was mentioned that UJ over war crimes was included implicitly under the obligation of *aut dedere aut judicare* in the 1949 Geneva Conventions.[91] The most important observations about these 9 states can be listed in the following points:

4.2.1.2.1: The Implicit Adoption of UJ and Its Relationship to the Principle of *Aut Dedere Aut Judicare*

The constitutions of these states provide that their national legislation should be in line with the provisions of international conventions.[92] Therefore, they have relied on the texts of international conventions alone in adopting UJ,[93] and have relied on the principle of *aut dedere aut judicare* as a basis for the existence of UJ in their national legislation.[94] Due to the fact that the clarity of the principle of the *aut dedere aut iudicare* that provided by the significant number of international conventions expressly.[95] In addition to the fact that this principle is considered more important than UJ.[96] However, this has been subject to misunderstanding and conceptual contradiction[97] as some states confuse UJ with the principle

[90] See International Committee of the Red Cross (ICRC), Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31, Art. 49; International Committee of the Red Cross (ICRC), Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85, Art. 50; International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135, Art. 129; International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, Art. 146.

[91] Malcolm Shaw, *International Law*, (6th edn. Cambridge University Press, 2008) 671-674. See also Paul Donovan Arnell, *International Jurisdiction and Crime: A Substantive and Contextual Examination of Jurisdiction in International Law*, (PhD Thesis University of Hull 1998) 78.

[92] Constitution of Qatar, 9 April 2004, Art 6, available at http://portal.www.gov.qa/wps/portal/!ut/p/a0/04_Sj9CPykssy0xPLMnMz0vMAfGjzOIt_S2cDS0sDNwtQgKcDTyNfAOcLD3cDdw9zfULsh0VAQl92_s!/ [accessed 25 July 2020]. See also Report of the UN Secretary-General, (n 23), para 30, p 7.

[93] Dalila Hoover, (n 6), 88.

[94] Pavel Caban, (n 11), 190

[95] International Law Association, Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences, prepared by the Committee on International Human Rights Law and Practice, submitted to (London Conference, 2000), 10.

[96] Report of the UN Secretary-General, (n 17), para 22, p. 7.

[97] Observations by Permanent Mission of Pure to the UN on the scope and application of the principle of universal jurisdiction, the 65th session, the Sixth Committee of UN, (2010), p. 5-6, available at <http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Peru_E.pdf> [accessed 20 July 2020]. See also Observations by Permanent Mission of the United States to the UN on the scope and application of the principle of universal jurisdiction, the 65th session, the Sixth Committee of UN, (2010), p. 3-4, available

of aut dedere aut judicare and believe that they are equal.[98] On the other hand, there is point of view that the criminal jurisdiction resulting from the principle of *aut dedere aut judicare* is not part of UJ, rather it is called Treaty-Based Jurisdiction.[99]

Firstly, with regard to the claim that the two principles are equal, this point of view was criticised, due to the fact that UJ is a basis for criminal jurisdiction only and does not itself imply an obligation to submit a case for potential prosecution. In fact, UJ is quite distinct from the obligation to prosecute or extradite, the implementation of which is subject to limitations and conditions set out in a particular treaty involving the obligation.[100] In addition, it was argued that UJ contains a criterion for the attribution of jurisdiction, whereas the obligation to prosecute or extradite is an obligation that is discharged once the accused is extradited or once the State decides to prosecute based on any of the available bases of jurisdiction.[101] It is worth mentioning that the two principles share the fact that they aim to prevent the criminals who commit the most serious international crimes from impunity.[102] Despite this participation, the two principles are technically independent.[103]

On the other hand, with regard to the relation between UJ and Treaty-Based Jurisdiction, procedural rules resulting from the principle *of aut dedere aut judicare* mentioned under international conventions are not always UJ.**[104]** Due to the fact that the provisions of any international convention are restricted and should not create legal obligations for non-state parties,[105] unless the provisions of these conventions are deemed to be a peremptory norm

at<http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/United%20States.pdf> [accessed 20 July 2020].

[98] Report of the UN Secretary-General, (n 17), para 21-22, p. 7.

[99] Matthew Garrod, (n 13), 132-133.

[100] Report of the UN Secretary-General, (n 17), para 18, p. 6.

[101] Ibid, para 19, p. 7.

[102] Pavel Caban, (n 11), 190. See also Nicolaos Strapatsas, 'Universal jurisdiction and the International Criminal Court', (2002) 29 Manitoba Law Journal 1, 11.

[103] Observations by Permanent Mission of Malaysia to the UN on the scope and application of the principle of universal jurisdiction, the 65th session, the Sixth Committee of UN, (2010), para 5, p. 2, available at <http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Malaysia.pdf> [accessed 20 July 2020].

[104] Matthew Garrod, (n 13), 132-133.

[105] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, Art 34. See also Pavel Caban, (n 11), 190.

under customary international law, in which case its provisions will be applied to the entire international community.[106]

To that end, if an international convention criminalises an act such as torture, and the latter is classified as *jus cogens* violation, such classification will have the legal effect of creating UJ as a procedural rule. It is worth mentioning that UJ does not arise automatically, but it needs to be practised by States as a means of fulfilling their commitment to fill the impunity gap. Indeed, by this approach UJ has been recognized as a legal principle over the most serious international crimes. Therefore, it is clear that the reason is not in the principle of *aut dedere aut judicare*, but in the violation of *jus cogens*, which generated an obligations *erga omnes* and made the criminal act of universal character.

As mentioned in chapter 3, the common factor among international crimes subject to UJ is the fact that such crimes constitute a violation of *jus cogens*.[107] Therefore, UJ can be invoked as the legal basis for criminal prosecution by any state if the accused presence in its territory.[108] In this matter, the principle of *aut dedere aut judicare* could support the exercise of UJ as a legal basis for criminal jurisdiction due to the fact that the principle of *aut dedere aut judicare* will permit States one of the following possibilities.[109] Firstly, the exercise of criminal jurisdiction based on traditional links of jurisdiction.[110] Secondly, extradite perpetrators to another State that is capable and willing to exercise the criminal jurisdiction.[111] The third option in the absence of the traditional basis of jurisdiction and the

[106] Ibid, Art 53. See also Mahmoud Cherif Bassiouni, (n 24), 119. See also William A. Schabas, Convention for the Prevention and Punishment of the Crime of Genocide, United Nations, 2008 United Nations Audio-visual Library of International Law, available at http://legal.un.org/avl/ha/cppcg/cppcg.html [accessed 20 May 2020].

[107] These crimes involve piracy, slavery, war crimes, genocide, crimes against humanity and torture. See The Princeton Principles on Universal Jurisdiction, (2001) 28 Princeton University Program in Law and Public Affairs, Article 2. See also Mahmoud Cherif Bassiouni, (n 24), 105.

[108] Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, para 91. Pavel Caban, (n 11), 185. See also Fannie Lafontaine, (n 31), 1285. See also Christian Tomuschat and Jean-Marc Thouvenin, eds, *The Fundamental Rules Of The International Legal Order Jus Cogens And Obligations Erga Omnes*, (1st edn, Martinus Nijhoff Publishers, 2006) 269.

[109] Ryngaert Cedric, *Jurisdiction in International Law*, (2edn, Oxford University Press 2015) p 52. See also Paola Gaeta, 'Donnedieu De Vabres On Universal Jurisdiction Introductory Note', (2001) 9 Journal of International Criminal Justice 905, 908.

[110] Anthony J. Colangelo, 'The Legal Limits of Universal Jurisdiction', (2006) 47 Virginia journal of international law 149, 150.

[111] Malcolm Shaw, (n 91), 671-674. See also Paul Donovan Arnell, (n 91), 78.

state's failure to extradite the accused to another state, the criminal jurisdiction can be exercised based on the universality principle if the accused is in the state territory .[112]

By and large, it can be concluded that the two principles aim to fill the gap of impunity.[113] Additionally, the principle of *aut dedere aut judicare* supports the exercise of UJ as a legal basis for the criminal jurisdiction when crime amounts to a *jus cogens* violation.[114] This point raises an important issue, which is the role of treaties' provisions in identifying customary international law in the context of UJ. Accordingly, this issue will be discussed in the following section, which examines the existence of the two constituent elements of customary international law in the context of UJ.

4.2.1.2.2: The Adoption of the Dualism Theory of International Law and Its Impact on the Implicit Adoption of UJ

Notwithstanding the above argument, all of the nine states have recognised the principle of UJ as an important principle to fill the gap of impunity. However, the relationship between national law and international law varies according to the theory adopted by each state. Some states, such as Colombia, have adopted the dualism theory of international law, whereas others have not.[115]

The dualism theory provides that the provisions of international law and domestic law are independent of each other.[116] Therefore, the provisions of international law should be translated into domestic laws in order to be applied by national courts.[117] Accordingly, the

[112] Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), (n 108), para 119. See also Petra Baumruk, *The Still evolving Principle of Universal Jurisdiction,* (PhD Thesis Charles University in Prague, 2015) 49.
[113] Ibid, para 118. See also Pavel Caban, (n 11), 190; Nicolaos Strapatsas, (102), 11.
[114] Pavel Caban, (n 11), 185. See also Christian Tomuschat and Jean-Marc Thouvenin, (n 108) 269.
[115] Observations by Permanent Mission of Colombia to the UN on the scope and application of the principle of universal jurisdiction, the 68th session, the Sixth Committee of UN, (2013), available at<http://www.un.org/en/ga/sixth/68/UnivJur/Colombia_E.pdf> [accessed 3 July 2020]. See also Observations by Permanent Mission of Qatar to the UN on the scope and application of the principle of universal jurisdiction, the 66th session the Sixth Committee of UN, (2011), available at <http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Qatar.pdf> [accessed 3 July 2020].
[116] Olympia Bekou, *International criminal justice at the interface: the relationship between international Criminal courts and national legal orders*, (PhD Thesis University of Nottingham 2005) 242.
[117] Ibid.

national judges of these states cannot apply the provisions of international law, unless they enact domestic law that explicitly incorporates the provisions of the international treaties.[118]

Regarding UJ, it was observed that Colombian legislation did not explicitly provide the principle of UJ, however, it was argued that the principle was implicitly recognised.[119] This is because Colombia has signed several international conventions that oblige Colombia to take judicial action against the perpetrator of violations contained in these treaties.[120] In this regard, Article 93 of the Constitution was invoked to justify this view.[121] In fact, Article 93 of the Constitution provides that the Colombian state is obliged to apply the provisions of conventions ratified by it.[122]

The Colombian Constitutional Court considers that UJ is a mechanism for international cooperation as it confronts the most serious crimes that concern the international community as a whole.[123] In addition, the Constitutional Court has recognised that universal principle of jurisdiction enables any State to exercise jurisdiction over certain crimes that specifically have been condemned by the international community, such as genocide and torture.[124]

Nevertheless, the Colombian Constitutional Court claimed that although there are international provisions permitting the exercise of UJ, Colombian courts cannot exercise this jurisdiction unless it is expressly provided under Colombian law.[125] Colombia adopts the dualism theory in international law;[126] accordingly, the exercise of UJ in Colombian requires that the criminal act should be criminalized by the national law.[127] As a consequence of the

[118] David Feldman, 'Monism, Dualism and Constitutional Legitimacy', (1999) 20 Australian Yearbook of International Law 105.
[119] Observations by Permanent Mission of Colombia to the UN, (n 115).
[120] Ryan Rabinovitch, (n 77), 526.
[121] Colombia's Constitution of 1991 with Amendments through 2005, Translated by Marcia W. Coward, Peter B. Heller, Anna I. Vellve Torras, and Max Planck Institute, Oxford University Press, available at<https://www.constituteproject.org/constitution/Colombia_2005.pdf> [accessed 29 June 2020].
[122] Ibid.
[123] Constitutional Court Colombia, The Constitutional Court judgements, C-1189 de 2000, MP, Carlos Gaviria Díaz, y C-554 de 2001, MP Clara Inés Vargas Hernández and C-979 de 2005 MP Jaime Córdoba Triviño, available at http://www.corteconstitucional.gov.co/relatoria/2005/C-979-05.htm [accessed 15 June 2020]. See also Observations by Permanent Mission of Colombia to the UN, (n 115).
[124] Ibid.
[125] Ibid. See also Observations by Permanent Mission of Colombia to the UN, (n 115).
[126] Olympia Bekou, (n 116), 242. This theory argue that international law and domestic law are two systems that are completely independent of each other. In the light of bilateralism, treaty provisions must be incorporated separately into domestic law to obtain domestic influence.
[127] Observations by Permanent Mission of Colombia to the UN, (n 115).

lack of national legislation allowing UJ directly in Colombia, UJ cannot be exercised. The research will discuss the obstacles that have faced the national courts implementation on UJ later in this chapter.

4.2.1.2.3: The Adoption of the Monism Theory of International Law and Its Impact on the Implicit Adoption of UJ

By contrast, other states, such as South Korea, Argentina and Peru have adopted the monism/monist theory of international treaty law.[128] The monism theory provides that the texts of international conventions should be applied directly in their law.[129] Accordingly, these states consider that the provisions of international law and the provisions of domestic law are united and complementary to each other.[130] Thus, there is no need to translate the provisions of international law into their national law, because it is incorporated automatically, i.e. once a country or State has ratified it at international level.[131] As mentioned, there is no international convention that has regulated the practice of UJ and has determined the scope of its application directly.[132] Accordingly, most of the above-mentioned states have used the obligation to prosecute stipulated in the international conventions to justify the permissibility of exercising UJ.[133]

For instance, it was argued that UJ is recognised by South Korean.[134] This is based on Article 6 (1) of the Korean Constitution, which states that "Treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the

[128] Observations by Permanent Mission of Tunisia to the UN on the scope and application of the principle of universal jurisdiction, the 65th session the Sixth Committee of UN, (2010), available at <http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Tunisia_E.pdf> [accessed 20 July 2020]. See also Observations by Permanent Mission of Pure to the UN, (n 97); Observations by Permanent Mission of Malaysia to the UN, (n 103).

[129] Ryan Rabinovitch, (n 77), 504. See also Harmen van der Wilt, 'Universal Jurisdiction under Attack: an assessment of African misgivings towards international criminal justice as administered by Western states', (2011) 9 Journal of International Criminal Justice 1043, 1049.

[130] Olympia Bekou, (n 116), 242.

[131] Ibid.

[132] International Law Association, (n 95), 10.

[133] Theodor Meron, International Criminalization of Internal Atrocities, (1995) 89 The American Journal of International Law 554, 569.

[134] Observations by Permanent Mission of the Republic of Korea to the UN on the scope and application of the principle of universal jurisdiction, the 65th session, the Sixth Committee of UN, (2010), available at <http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/RepublicofKorea.pdf> [accessed 3 July 2020].

same effect as the domestic laws of the Republic of Korea"[135] In fact, the Korean Permanent Mission to the United Nations said that the South Korean State believes that UJ is an accepted principle under international law.[136] Furthermore, UJ is equal to the principle of extradite or prosecute (*aut dedere aut judicare*) contained in several international conventions, such as the Geneva Convention 1949 on war crimes.[137] Consequently, UJ was invoked by the Supreme Court of Korea, however, the court did not distinguish between aut dedere aut judicare and UJ, rather it relied on the principle of aut dedere aut judicare to justify the possibility of exercising UJ.[138] On the other hand, it was mentioned that the exercise of UJ in the Republic of Korea requires the physical presence of the accused in the Korean territory.[139]

A further relevant example is Argentina, which exercising UJ based on its constitution. Indeed, it has relied on article 118 which stipulates the procedures for trying those accused of committing crimes in accordance with the international conventions that Argentina has ratified.[140] In addition, article 75 (22) which declares that the provisions of international conventions ratified by Argentina are considered part of Argentinian legislation once ratified and have a higher hierarchy than other national laws.[141] Accordingly, Argentinian criminal law is applied to crimes committed outside the territory of Argentina if an international treaty obliges Argentina to do so. Such treaties include the Geneva Conventions of 1949 and the Additional Protocols thereto and Convention on the Prevention and Punishment of the Crime of Genocide, 1948.[142]

It should be noted that the Argentinian legislator is satisfied with these constitutional provisions and has not adopted other legislation that regulates the exercise of UJ.[143] However,

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[135] Ibid. See also Constitution of The Republic of Korea, promulgated on July 17, 1948, the last amendment was on October 27, 1987. Art 6, available at <https://elaw.klri.re.kr/eng_service/lawView.do?lang=ENG&hseq=1> [accessed 30 June 2020].
[136] Ibid.
[137] Report of the UN Secretary-General, (n 17), para 21, p. 7. See also Mahmoud Cherif Bassiouni, (n 24), 145-149.
[138] Observations by Permanent Mission of the Republic of Korea to the UN, (n 134).
[139] Act on the Punishment of Crimes within the Jurisdiction of the International Criminal Court, enacted on December 21, 2007, The Republic of Korea, Act N. 8719, Art 3 (5), available at <http://www.moleg.go.kr/english/korLawEng?pstSeq=47576> [accessed 20 July 2020].
[140] Constitution of the Republic of Argentina, 1853 (Re 1983, revision 1994). Constitute. Retrieved 2 March 2015, art 118.
[141] Ibid, art 75(22).
[142] Report of the UN Secretary-General, The Scope and Application of the Principle of Universal Jurisdiction, Seventy-third session, UN. Doc. No A/73/123 (July 3, 2018) para 6, at 2.
[143] Ibid.

such approach is problematic because there is no international convention that has regulated the practice of UJ and determined the scope of its application directly.[144] Therefore, the absence of legislation governing the exercising of UJ could be an obstacle due to the fact that states cannot rely on the texts of international conventions alone in applying UJ.[145]

Despite this, on November 13, 2019, a number of NGOs requested Argentinian courts to open an investigation into the crimes committed against the Rohingya in Myanmar since 2017.[146] Before that, in 2010, Argentina had exercised UJ over crimes against humanity committed in Spain during the Franco-era between 1936 and 1952.[147] Based on these practice, it was observed, firstly, that Argentina has exercised UJ in a subsidiary manner,[148] which means that UJ will be exercised only if the State in which the crimes are committed or the State in which the accused are national is unwilling or unable to prosecute the accused.[149] Accordingly, the Argentinian judiciary has continued to hear the case of the Franco-era because the Spanish judiciary is unable to do so due to the 1977 amnesty law.[150] Regarding the case of Rohingya, the Argentinian judiciary did not find that Myanmar had taken serious measures to try the accused. Nevertheless, a court of the first instance initially dismissed the case, in December 2019, arguing that the investigation has already launched by the ICC. The decision to dismiss the case, however, was appealed, on 29 May 2020, the Federal Appeals Court in Buenos Aires

[144] International Law Association, (n 95), 10.

[145] e.g, see Javor et al. Order of Tribunal de grande instance de Paris, 6 May 1994; upheld on appeal by the Paris Court of Appeal, 24 October 1994 and by the Court of Cassation, Criminal Chamber, on 26 March 1996; Dupaquier et al., Order of Tribunal de grande instance de Paris, 23 February 1995. [hereinafter, Case of Javor et autres].

[146] Burmese Rohingya Organisation UK (BROUK), Argentinean judiciary moves closer to opening case against Myanmar over Rohingya genocide, 1st June 2020, available at https://progressivevoicemyanmar.org/2020/06/01/argentinean-judiciary-moves-closer-to-opening-case-against-myanmar-over-rohingya-genocide/ [accessed 27 June 2020].

[147] Laura Íñigo Álvarez, Challenges of universal jurisdiction: the Argentinian Complaint against Franco-era crimes and the lack of cooperation of the Spanish judicial authorities, (Blog van het Utrecht Centre for Accountability and Liability Law, 3 June 2019), available at http://blog.ucall.nl/index.php/2019/06/challenges-of-universal-jurisdiction-the-argentinian-complaint-against-franco-era-crimes-and-the-lack-of-cooperation-of-the-spanish-judicial-authorities/ [accessed 27 June 2020].

[148] ZHU Lijiang, 'Universal Jurisdiction Before the United Nations General Assembly: Seeking Common Understanding under International Law', in Morten Bergsmo and Ling Yan (eds), *State Sovereignty and International Criminal Law*, (Beijing: Torkel Opsahl Academic EPublisher, 2012) 217.

[149] Corte Suprema de Justicia de la Nación (Supreme Court), Argentina, Julio Simón et al. v. Public Prosecutor, No 17.768, S. 1767. XXXVIII, 14 June 2005; Report of the UN Secretary-General, (n 142) para 6, at 2.

[150] Ley 4611977, de 15 de octubre, de Amnistia [Law 46/1977, of 15 October, Amnesty] (Spain) 15 October 1977, BOE No 248, 17 October 1977; Michael Humphrey, 'Law, Memory and Amnesty in Spain', (2014) 13 Macquarie Law Journal 25, 26.

overturned the decision.[151] In this matter, it was mentioned that ''the Court ruled that it is necessary to approach the ICC for more information about its case against Myanmar through a formal diplomatic note, before making a final decision on whether to open an investigation in Argentina''.[152] In this regard, the research believes that the Argentinian judiciary might not continue in this case due to the investigation that has already launched by the ICC. In addition, the absence of victims or accused persons on Argentinian soil may make it difficult for the court to reach the truth and conduct a fair trial.

Secondly, it was observed that Argentinian judiciary permits the exercise of UJ in absentia. However, such an absolute exercise of UJ may contradict with the international law. As mentioned before, UJ *in absentia* has been subject to legal criticism. For example, Judge Guillaume said that "[u]niversal jurisdiction in absentia … is unknown to international law".[153] Indeed, it was argued that there is no legal basis that supports the legality of UJ *in absentia* because the lack of the states' practice as most states do not allow UJ in absentia.[154] Additionally, there is no legal provision under conventional international law allows UJ in absentia.[155] Based on this view, the research believes that Argentina might face practical problems regarding exercising UJ over the genocide committed in Myanmar.

In light of the above-mentioned observations, it can be concluded that the scope of UJ is not often defined under the national legislation of states that adopted the monism theory of international law.[156] The reason is that they frequently rely on the implicit reference to UJ in the international conventions. However, the absence of legislation governing the exercising of UJ could be an obstacle due to the fact that states cannot rely on the texts of international

[151] Buenos Aires court of the first instance, (Burmese Rohingya Organisation UK (BROUK) and others V Myanmar authority), 13 November 2019; The Federal Appeals Court in Buenos Aires, decision on 29 May 2020. See also The ICC, Pre-Trial Chamber III, Decision on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC. Doc. No. (ICC-01/19-27 14-11-2019 1/58 NM PT) 14 November 2019, para 1-2, at 4.
[152] Burmese Rohingya Organisation UK (BROUK), (n 146).
[153] Separate Opinion of President Guillaume, the Judgment of 14 February 2002, Case Concerning the Arrest Warrant of 11 April 2000 (the Democratic Republic of the Congo v. Belgium), International Court of Justice (ICJ), 14 February 2002, available at http://www.icj-cij.org/files/case-related/121/121-20020214-JUD-01-01-EN.pdf.
[154] ZHU Lijiang, (n 148), 217. See also Fannie Lafontaine, (n 31), 1283.
[155] Mark A. Summers, 'The International Court of Justice's Decision in Congo V. Belgium: How Has It Affected The Development of A Principle of Universal Jurisdiction That Would Obligate All States To Prosecute War Criminals?', (2003) 21 Boston University International Law Journal 64, 67-70.
[156] Mahmoud Cherif Bassiouni, (n 24), 152.

conventions alone in applying UJ.[157] Particularly, there is no international convention that has regulated the practice of UJ and determined the scope of its application directly.[158] Consequently, the research argues that these states should not only rely on the implicit reference to UJ under international conventions, but rather they should codify UJ in their national laws in a manner that clarifies the concept, scope and conditions of this jurisdiction.[159]

4.2.1.3: Verbal Recognition of UJ

A significant number of States have recognised the principle of UJ as an important principle to fill the gap of impunity. In this matter, 17 out of the 72 states have recognised UJ verbally as an accepted principle under international law, however, they have not adopted any actual legislation to allow UJ in their legal systems.[160] In fact, most of these states criminalise in their national law one or more of the international crimes which include genocide, war crimes and crimes against humanity.[161] Regardless, the national legislation of these states do not address the principle of UJ. Accordingly, their national courts have not registered any effective practice of UJ.[162]

For instance, Jordan is one of the state parties to the ICC.[163] Jordan believes that UJ is an important principle to fill the gap of impunity.[164] However, Jordan has not supported the above view by adopting UJ over the most serious crimes which include genocide, war crimes and crimes against humanity.[165]

On the other hand, these crimes, except war crimes, were criminalised as ordinary crimes under Jordanian national law, so there is no provision under Jordanian national legislation to

[157] Dalila Hoover, (n 6), 88.
[158] International Law Association, (n 95), 10.
[159] Ibid.
[160] The 17 states out of the 72 include (Algeria, Jamaica, Egypt, Morocco, Nigeria, Tanzania, China, India, Indonesia, Iran, Japan, Jordan, Kuwait, Oman, Singapore, Saudi Arabia, Thailand).
[161] Amnesty International, (n 3), 16-21.
[162] Report of the UN Secretary-General, (n 23), para 53, p 11. See also Report of the Secretary-General, The scope and application of the principle of universal jurisdiction, Sixty-eighth session, UN. Doc. No A/68/113 (26 June 2013), para28, p. 6.
[163] On 7 October 1998, Jordan signed the Rome Statute. on 11 April 2002 Jordan deposited its instrument of ratification of the Rome Statute. See U.N. Treaty Collection, Rome Statute of the International Criminal Court, Ratifications and Signatories, <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en> [accessed 1 July 2020].
[164] Report of the UN Secretary-General, (n 47), para 28, p 7.
[165] Ibid.

address and define these crimes comprehensively.[166] In this matter, it was argued that Jordanian law had criminalized the acts constituting international crimes as ordinary crimes, such as murder and rape.[167] Furthermore, there is no provision under Jordanian national legislation to allow the exercise of UJ over genocide, war crimes and crimes against humanity. In fact, these crimes are subject to traditional criminal jurisdiction which falls under national legislation.[168] However, the Jordanian national legislation has not adopted any legislation allowing the exercise of UJ over these crimes.[169] Accordingly, the question that arises is whether the verbal recognition of UJ has an impact on the emergence of the customary rule; this issue will be discussed in next section.

Further examples for the verbal recognition of UJ are Saudi Arabia and Iran. Both states have explicitly confirmed that UJ is recognised as an important principle to fight against the impunity.[170] However, they have criticised the misuse of UJ. Iran criticised the violation of the principle of diplomatic immunity and the exercise of UJ over the holder of this immunity.[171] Saudi Arabia criticised the absence of international legal standards that regulate the exercise of UJ.[172] Therefore, Saudi Arabia argued that this issue will be led to the misuse of UJ and violations of international law principle such as State sovereignty.[173]

Regarding the criminalisation of international crimes, Iran and Saudi Arabia have criminalised the acts as ordinary crimes.[174] Thus, though UJ is accepted as a legal principle under international law, neither Saudi nor Iran have adopted any actual legislation to allow UJ in their legal systems. In this matter, they claimed that the lack of adopting UJ is due to the fact

[166] Amnesty International, (n 3), 68.
[167] The Military Criminal Code no. 43 of 1952 was replaced by Military Criminal Code no. 30 of 2002 and amended by the law no. 58 of 2006. Jordanian Military Penal Code 58 (2006), Official Gazette, No. 4790, 11.01.2006, p. 4274-4293 No. 58 of 2006, Art 41-44 defined only war crimes, available in Arabic at https://www.icrc.org/applic/ihl/ihlnat.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl [accessed on 1/07/2019].
[168] The Jordanian Penal Code, as amended (No 16 of 1960) page 374 of the Official Gazette (No 1487) dated 11 May 1960, Art 10 (1) and (4).
[169] Amnesty International, (n 3), 18.
[170] Sixth Committee of the UN, Summary Record of the 13th meeting, Seventy-second session, 6 December 2017, UN. Doc. No A/C.6/72/SR.13, para 8, p. 2 and para 88, p. 12.
[171] Ibid, para 7-8, p. 2.
[172] Ibid, para 88, p. 12.
[173] Ibid.
[174] Iran, The Islamic Penal Code (IPC) - Islamic Consultative Assembly (Majlis), Official Gazette 1392-02-01 (2013-04-21) Adoption: 2013-04-21 | IRN-2013-L-103202. See also Mansour Farrokhi, 'The Application of Universal Jurisdiction in Iranian Criminal Law', (2015) 6 International Journal of Business and Social Science 93, 94-95.

that there is a need to regulate UJ internationally in order to avoid possible misuse. Accordingly, it can be argued that UJ in these countries does not exceed verbal recognition and there is no legal text or practice that supports the principle of UJ in these countries.

In light of the above observations, it can be concluded that UJ is recognised verbally by number of states as an accepted principle under international law, however, they have not adopted any actual legislation to allow UJ in their legal systems.[175] Though states criminalise international crimes that are subject to UJ, they do not give their judicial system UJ over the perpetrators of such crimes. Therefore, it is possible to say that the actual existence of the principle of UJ in these states is yet to be realised.[176] Accordingly, the following section will discuss the role of verbal recognition of UJ in the emergence of the customary rule. Finally, it can be concluded that the lack of national legislation permitting UJ in these states could be classified as an obstacle; this is discussed later in this chapter.

4.2.2- The Existence of the Two Constituent Elements of Customary International Law in the Context of UJ

It is argued that customary international law is the second main source of international law. International custom is defined as follows: " international custom, as evidence of a general practice accepted as law;"[177] Accordingly, International custom consists of two main elements: the state practice and *opinio juris*.[178] Regarding UJ, it has been argued that it is recognised as legal principle under customary international law,[179] due to the fact that the sense of obligation and State practice are exist in UJ.[180] The Institute of International Law

[175] The 17 states out of the 72, see (n 160).
[176] Pavel Caban, (n 11), 175.
[177] Statute of the International Court of Justice, United Nations, 18 April 1946, Art 38 paragraph 1 (c) available at: http://www.refworld.org/docid/3deb4b9c0.html [accessed 28 August 2018].
[178] Draft conclusions on the identification of customary international law, See Chapter V Report of the International Law Commission, 70th Session, (2018) UN. Doc. No. A/73/10, Conclusion 2, p 124. See also Fabián O. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*, (1st edn Martinus Nijhoff Publishers 2008) 30. See also Colin Warbrick and Vaughan Lowe, *The United Nations and the Principles of International Law*, (1st edn, London, Routledge 1994) 12.
[179] Mitsue Inazumi, *Universal jurisdiction in modern international law: expansion of national jurisdiction for prosecuting serious crimes under international law*, (1st edn, Belgium, Intersentia Antwerp, 2005) 122.
[180] Claus Kreb, 'Universal Jurisdiction over International Crimes and the Institute de Droit international', (2006) 4 Journal of International Criminal Justice 561, 561-562. See also Robert Cryer, (n 89), 51.

stressed that UJ derives its legitimacy from international custom.[181] This point of view has been confirmed by a number of authors.[182] However, most studies rely on theoretical analysis and not on a practical study to evaluate the position of states on UJ. In other words, most of the above-mentioned argument regarding international custom as legal basis for UJ has been reached through theoretical analysis without practical assessment of the position of States.[183]

Accordingly, some authors have recently questioned the existence of UJ under customary international law.[184] For example, Matthew denied the existence of UJ under customary international law because he defined UJ as an absolute jurisdiction only, he did not recognise the existence of conditional UJ. in this matter, he called such conditional jurisdiction Treaty-Based Jurisdiction.[185]

In this matter, there is a lack of clarity in the definition of UJ. As mentioned above, significant number of the previous studies confuse UJ with the principle of *aut dedere aut judicare*, or they limit the definition of UJ to absolute UJ and do not recognise the existence of conditional UJ.[186] It is also worth mentioning that, the methodology used by some of the previous studies often confused a *lex lata lex ferenda* study of law as law and the study of law as it should be.[187] In fact, the starting point for some studies was not built on a sound basis, because they relied on *lex ferenda* as the starting point for their research.[188]

In order to build this research on a sound basis, the starting point should be discussing law as law (*lex lata*), which can be achieved through an assessment of States' position on UJ.[189] Accordingly, this research assesses the position of States on UJ to ascertain the existence of UJ under customary international law. In this regard, the research carries out this assessment

[181] Institute of International Law, Resolution on Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes, Krakow Session - 2005, para 2.
[182] Devika Hovell, 'The Authority of Universal Jurisdiction', (2018) 29 European Journal of International Law 427, 434-438. See also Claus Kreb, (n 180), 566.
[183] Ibid; ZHU Lijiang, (n 148), 217; Amnesty International, (n 3); Máximo Langer, (n 71), 8-12; Matthew Garrod, (n 13), 169-172.
[184] Matthew Garrod, (n 13), 169-172.
[185] Matthew Garrod, (n 13), 172.
[186] Ibid, 169-177.
[187] Noora Arajärvi, 'Between Lex Lata and Lex Ferenda - Customary International (Criminal) law and the Principle of Legality', (2011) 15 Tilburg Law Review 163, 165.
[188] Fons Coomans, Fred Grünfeld and Menno T. Kamminga, 'Methods of Human Rights Research: A Primer', (2010) 32 Human Rights Quarterly 179, 180. See also Draft conclusions on the identification of customary international law, (n 178), Conclusion 3, p. 119.
[189] Noora Arajärvi, (187), 168.

based on the findings from a survey of 72 countries. It is worth mentioning that it is not required that the rule should be exercised by a certain number of States to be considered an international custom, but rather there is a need to prove that the exercise of such rule is widely.[190]

Regardless of the number of states, the research will examine the existence of the two constituent elements of customary international law in the context of UJ which are the *opinio juris* and state practice.[191] The research will focus firstly on examining the existence of State practice for UJ to find out whether States have actually practiced UJ over the most serious international crimes or not. Then, it will examine the existence of *opinio juris* in the context of UJ.

4.2.2.1 Examining State Practice in the Context of UJ

It was argued that in determining the customary international law, general practice is often the primary factor to be observed, and only then an investigation will be conducted as to whether this general practice has been accepted as law. It is worth mentioning that although this order of evaluation is not mandatory, it is a useful arrangement in determining the existence of the two constituent elements of customary international law in the context of UJ.[192] Therefore, the research will analyse the position of States on UJ to ensure the existence of a general practice that supports exercising such jurisdiction. Then, the research will discuss the second element of whether this practice is accepted as a law.

The question that arises from this approach concerns what criteria and method can be relied upon to identify both elements of international custom. The identification of customary international law has been addressed by the ICJ in many of its judgements and advisory opinion.[193] In addition, the ILC more recently issued draft conclusions on the identification of customary international law after discussing this subject within their agenda for seven consecutive years. The ILC has compiled the methodology that is used internationally for the identification of customary international law.[194] Consequently, the

[190] Draft conclusions on the identification of customary international law, (n 178), Conclusion 8, commentary 3, p. 136.
[191] Ibid, Conclusion 3, p. 126-127.
[192] Ibid, Conclusion 3, commentary 9, p 129.
[193] It should be noted that the subject of the identification of customary international law has been addressed by the International Court of Justice in many of its work, for instance, Colombian-Peruvian asylum case, Judgment of 20 November 1950, I.C.J. Reports 1950, p. 266, at p. 277. See also North Sea Continental Shelf cases, ICJ Reports, 1969, pp. 3, 43; 41 ILR, pp. 29, 72. See also Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports, 1986, pp. 14, 103–4; 76 ILR, pp. 349, 437. See also Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ Reports, 1996, pp. 226, 253; 110 ILR, p. 163.
[194] Draft conclusions on the identification of customary international law, (n 178), p. 117-156.

research will use the ICJ's judgements and advisory opinion as well as the ILC's draft conclusions on the identification of customary international law as a guide in analysing States' position on UJ.

4.2.2.1.1: Evaluating the Position of States that have Explicitly Adopted UJ

Regarding general practice, the research assesses the position of 72 States on UJ to ensure the existence of the general practice,[195] 46 of which have explicitly adopted UJ in their national legislation.[196] Here, the enactment of national legislation authorising UJ can be considered as form of State practice.[197] In fact, the legislative acts is classified as a form of State practice due to the fact that the existence of general practice could be ascertained by ensuring that States have exercised a customary rule through one of their executive, legislative or judicial institutions.[198] In this matter, the ILC confirmed that states' practice could be ascertained from the actions of the State through the exercise of its executive, legislative or judicial powers.[199] Accordingly, it can be argued that the adoption of national legislation authorising the exercise of UJ is the first manifestation of the existence of the state practice. However, there must be consistency and generality of the rule in order for it to be considered a customary rule under international law.[200] So, the question is whether state practice is general and consistent in terms of UJ.

Most countries have authorised their national courts to exercise criminal jurisdiction over the most serious international crimes, on condition that the accused are present in the territory of the state. By contrast, at present, most of states do not allow the exercise of absolute UJ with the exception of the crime of piracy.[201] Accordingly, the common perception is that UJ is conditional upon certain conditions,[202] including the presence of the accused in the territory of the state.

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[195] Military and Paramilitary Activities in and against Nicaragua, (n 193), para 183 p. 97.
[196] The 46 states out of 72, see (n 18).
[197] Draft conclusions on the identification of customary international law, (n 178), Conclusion 5, p 132. In this matter, conclusion 5 provided that "State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions"
[198] Draft Articles on Responsibility of States for internationally wrongful acts, in Report of the International Law Commission, 53rd Session, November 2001, UN Doc. A/56/10, Articles 4-5, p 43.
[199] Draft conclusions on the identification of customary international law, (n 178), Conclusion 5, Commentary 2. p 132.
[200] Colombian-Peruvian asylum case, (n 193), p. 277.
[201] Report of the UN Secretary-General, (n 17), para 16-17, p. 6.
[202] Ryan Rabinovitch, (n 77), 513. See also Maximo Langer, (n 10), 247.

Despite of the common perception on adopting the conditional UJ,[203] some states differ in determining the scope of such jurisdiction in their domestic laws.[204] In this matter, the ICJ argued that

> it is not to be expected that in the practice of States the application of the rules in question should have been perfect in the sense that States should have refrained, with complete consistency … The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules ... .[205]

In fact, the ICJ highlighted that consistency in State practice is not required to be total but rather such practice should be substantially uniform, meaning that some contradictions and inconsistencies will not be necessarily fatal to an establishment of "a general practice".[206] Accordingly, it is clear that full consistency is not required for the general practice, but rather substantive consistency is required.

Regarding UJ, although some countries have extended the scope of UJ to include some ordinary crimes, most countries share the view that the scope of UJ includes only the following crimes: piracy, slavery, war crimes, genocide, crimes against humanity and torture.[207] Additionally, most countries have authorised their national courts to exercise the criminal jurisdiction over the above-mentioned crimes, on condition that the accused presence on the territory of the state.[208]

In light of the above analyses, it can be argued that the material element of the customary international law does exist in the context of UJ. Due to the fact that a significant number of states allow UJ in their legal system. In this matter, it was observed that 46 states out of the

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[203] Jana Panakova, (n 7), 49-72.

[204] Amnesty International, (n 3), 12-16.

[205] Military and Paramilitary Activities in and against Nicaragua, (n 193), para. 186 p. 98.

[206] Ibid. See also North Sea Continental Shelf cases, (n 193), para 74 p. 43. The ICJ used these words "extensive and virtually uniform".

[207] Mahmoud Cherif Bassiouni, (n 24), 107. See also The Princeton Principles on Universal Jurisdiction, (n 107), art 2 (1). Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990 (Unofficial translation by Human Rights Watch) September 2, 2013, art 3 available at https://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers [accessed 1 April 2019].

[208] Rephael Ben-Ari, (n 17), 170.

72 states have explicitly adopted UJ in their national legislation. In fact, this figure shows that this practice is not limited to few numbers of state from specific region, but rather it is widely accepted by significant number of states across different continents. Additionally, there is common perception in most states that UJ is conditional.

4.2.2.1.2: Evaluating the Position of States that have Implicitly Adopted UJ

In addition to the aforementioned, nine states out of 72 have adopted UJ implicitly in their national legislation.[209] In fact, these nine states have relied on the provisions of the Conventions directly for adopting UJ. This point raises an important issue concerning the role of treaties' provisions in the identification of customary international law in the context of UJ.[210]

Despite the fact that treaties are binding only on the states' parties thereto, they may have a significant role to play in defining rules deriving from custom and recording them.[211] In this matter, art 38 of Vienna Convention stipulated that there is nothing to prevent a rule provided in a treaty from becoming binding on a third State as a customary rule of international law.[212] This view is confirmed by the ICJ as follows:

> It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.[213]

In fact, treaties could play a significant role in the identification and development of customary international law. Regarding UJ, it was noted that there was a synchronous relationship between customary international law and international treaties.[214] As mentioned in previous chapters, the scope of UJ was extended by international customary law after the Second World War to include the most serious international crimes such as war crimes, genocide, and torture since the commission of such crimes was considered a violation of

[209] 9 states out of the 72, see (n 88).
[210] Draft conclusions on the identification of customary international law, (n 178), Conclusion 11, p 143. North Sea Continental Shelf cases, (n 193), para. 27 p. 29 –30.
[211] Bing Bing Jia, 'The Relations between Treaties and Custom', (2010)9 Chinese Journal of International Law 81, 85.
[212] Vienna Convention on the Law of Treaties, (n 105), art 38.
[213] North Sea Continental Shelf cases, (n 193), para. 27 p. 29 –30.
[214] Claus Kreb, (n 180), 576. See also Yana Shy Kraytman, (n 5), 103.

peremptory norms under international law.[215] At the same time, it was noted that international treaties that criminalise such serious acts have been created, and these treaties have a role in confirming that the commission of such crimes is a violation of peremptory norms due to the fact that most countries of the world have ratified such treaties.

Accordingly, it was confirmed that the provisions of these convention had reached the level of *jus cogen* norms.[216] Hence, the exercise of UJ is considered as a manifestation of the fulfilment of the international obligation to combat the violations of peremptory norms under international law.[217] This interpretation was put forward by the Permanent Missions of these nine States during the work of the Sixth Committee of UN on UJ.[218]

However, the provisions of international convention cannot be applied directly in national criminal trials because most international conventions do not include clear criminal provisions. Particularly they did not specify the penalties for the perpetrators of these prohibited acts, rather, they demand states to adopt the necessary legislation for criminalizing international crimes and punishing the perpetrators. Additionally, most international conventions recognise the concept of UJ implicitly.[219] There is no explicit provision authorising the exercise of UJ in international conventions. In this regard, the case of *Javor et autres* before the French judiciary could be used as an example,[220] as it was argued that "French courts have held that the Conventions were not directly applicable in national law."[221]

In light of the above analyses, the position of the nine states is evidence of non-objection to UJ but cannot be seen as clear evidence of States' practice to UJ. Accordingly, states should adopt sufficient legislation to criminalise and punish international crimes, and states should

[215] Bruce Broomhall, (n 66), 400-402. See also Theodor Meron, (n 133), 569.
[216] Sienho Yee, (n 69), 505-507.
[217] Peter Weiss, 'Universal Jurisdiction: Past, Present and Future', (2008) 102 American Society of International Law 406, 407.
[218] Observations by Permanent Mission of Malaysia to the UN, (n 103); Observations by Permanent Mission of Qatar to the UN, (n 115); Observations by Permanent Mission of Tunisia to the UN, (n 128); Observations by Permanent Mission of the Republic of Korea to the UN, (n 134).
[219] Robert Cryer, (n 89), 50.
[220] Case of Javor et autres, (n 145).
[221] Human Rights Watch, Universal Jurisdiction in Europe. The State of the Art, June 2006, Human Rights Watch Vol18, NO. 5(D), at 55, available at: https://www.refworld.org/docid/48fda4872.html [accessed 7 August 2019].

adopt the necessary legislation to permit the exercise of UJ. Otherwise, the lack of such provisions under national legislation could be an obstacle to the exercise of UJ.[222]

4.2.2.1.3: Evaluating the Position of States that have Verbally Recognised UJ

Finally, seventeen out of 72 states have recognised UJ verbally as accepted principle under international law, however, they have not adopted any legislation to allow UJ in their legal systems.[223] Accordingly, the question that arises is whether the verbal recognition of UJ has an impact on the emergence of the customary rule. In this matter, it was argued that verbal acts can be counted as a form of State practice.[224] In fact, the ILC supported this point of view by claiming that "Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction"[225] Accordingly, the assessment of whether verbal acts can be considered as states' practice depends on the consistency of verbal acts and their formation of general perception.

By contrast, some authors argue that it is only what is done by States rather than what is said by states that counts as practice for the purposes of determining customary international law. For example, Matthew states that verbal acts are not an appropriate means of considering state practice because words can be misinterpreted.[226] However, if the verbal act that sets out the details of the customary rule are announced explicitly by Governments, they can be regarded as evidence of State practice because Governments are one of the main sources of information regarding State practice. However, if the verbal acts were made general by governments and do not spell out the details of the customary rule, they could be considered only as evidence of non-objection to the customary rule.[227]

Regarding UJ, statements from the seventeen states unanimously agreed that UJ is an effective means of combating impunity for the most serious crimes.[228] By contrast, they suggested that UJ was misused by some States that had authorised absolute UJ, and some

[222] Bruce Broomhall, (n 66), 399-400.
[223] The 17 states out of the 72, see (n 160).
[224] Claus Kreb, (n 180), 573- 576. See also Bruno Simma and Andreas L. Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts–A Positivist View', (1999) 93 The American Journal of International Law 302, 302.
[225] Draft conclusions on the identification of customary international law, (n 178), Conclusion 6 (1), p 133.
[226] Matthew Garrod, (n 12), 27.
[227] U.N. Doc. A/CN.4/659 (14 March 2013), para 24.
[228] Sixth Committee of the UN, (n 170).

States had extended it to ordinary crimes. With the exception of this general statement, there is no effective legislation in these countries that permits the exercise of UJ.[229]

Hence, the position of the seventeen states is evidence of non-objection to a conditional UJ but cannot be seen as evidence of States' practice to UJ. This is due to the fact that the verbal statements of these states are brief and did not show what UJ in the concept of these countries and how could be exercised. Therefore, it is clear that the position of the seventeen States can be used only as evidence that there is no objection to the existence of a conditional UJ as a customary rule of international law.

4.2.2.2- Examining the Existence of *Opinio Juris* in the Context of UJ

The existence of the states' practice does not *per se* suffice to establish a rule of customary international law. It is also required that there is existence for the psychological or subjective element which is (*opinio juris*) an acceptance as laws.[230] Due to the fact that the *opinio juris* distinguishes between custom and habit or mere usage,[231] the question that arises is what *opinio juris* is? In this matter, the ILC noted that "The requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio juris*) means that the practice in question must be undertaken with a sense of legal right or obligation".[232] In fact, *opinio juris* is considered to be the subjective element of customary international law, which requires that the acts should be carried out of a sense of legal obligation or legal right.[233] Accordingly, it is clear that the practice should be undertaken with a sense of obligation or legal right; that is, it should be accompanied by a conviction that it is required or permitted by customary international law. As the ICJ in the North Sea Continental Shelf case confirmed, for the existence of customary international law the practice of States

[229] Ibid.
[230] Continental Shelf case (Libya v. Malta) Judgment, I.C.J. Reports 1985, Rep 13, para. 27, p. 29–30. See also Emily Kadens and Ernest A. Young, 'How Customary Is Customary International Law?', (2013) 54 William and Mary Law Review 885, 920.
[231] Draft conclusions on the identification of customary international law, (n 178), Conclusion 9, p 138. See also J. L. Slama, 'Opinio Juris in Customary International Law', (1990) 15 Oklahoma City University Law Review 603, 656.
[232] Ibid.
[233] Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960, p. 6, at p. 82, (Dissenting Opinion of Judge Armand Ugon).

must be accompanied with a subjective element, which could be the sense of normative commitment.[234]

In addition, it was argued that the *opinio juris* could also exist as long as the practice is undertaken with a sense of legal right. As mentioned above, the ILC stressed that that the subjective element of customary international law could have two forms: a sense of a legal obligation and a legal right.[235] For instance, in the *Right of Passage* case, the ICJ noted that States have practiced the Right of Passage as a legal right. Indeed, the ICJ mentioned that

> This practice having continued over a period extending beyond a century and a quarter unaffected by the change of regime in respect of the intervening territory which occurred when India became independent, the Court is, in view of all the circumstances of the case, satisfied that that practice was accepted as law by the Parties and has given rise to a right and a correlative obligation[236]

Thus, the subjective element of international custom in this case has taken the form of a sense of legal right. This point of view was mentioned in a paper published in 1957 as "The phrase 'accepted as law', however, may admit of interpretation in senses which more accurately reflect the actual processes of evolution from practice or usage to custom, whether viewed from the standpoint of the exercise of rights or that of the performance of obligations".[237] Accordingly, it is clear that the second element of customary international law, which is the acceptance as a law, can have two forms: either to practice as a legal right or practice as a legal obligation.

In light of the above, the research will examine the existence of *opinio juris* in the context of UJ. As mentioned above, almost all of the 72 states examined have accepted UJ as a legal principle under international law. Regarding the existence of *opinio juris*, the explicit adoption of UJ into national law could be clearly classified as evidence for the existence of *opinio juris*.

[234] North Sea Continental Shelf cases, (n 193), para. 77 p. 44.
[235] Draft conclusions on the identification of customary international law, (n 178), Conclusion 9 (1), p 138.
[236] Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960, p. 6, at p. 40
[237] C. MacGibbon, 'Customary international law and acquiescence', (1957) 33 British Yearbook of International Law 115, 129. See also International Law Commission, Second report on identification of customary international law, by Special Rapporteur Michael Wood, ILC Sixty-sixth session, 22 May 2014, A/CN.4/672, para 68, p 56.

As mentioned above, it was observed that 46 out of the 72 states have adopted UJ explicitly in their national legislation.[238] Indeed, it is a clear indication of the feeling of States that UJ is a legal principle permitted by international law. Secondly, a significant number of diplomatic representatives expressed their states' views on UJ during the work of the Sixth Committee of the UN on determining the concept and scope of UJ.[239] Here it was confirmed that UJ is a legal principle permitted by international law. These statements were not limited to specific countries, rather, most countries declared that the principle of UJ was permissible as a legal principle under international law. It is worth mentioning that the public statement on behalf of a State is classified as form of evidence for *opinio juris*.[240] The ILC argued that

> Among the forms of evidence of acceptance as law (*opinio juris*), an express public statement on behalf of a State that a given practice is permitted, prohibited or mandated under customary international law provides the clearest indication that the State has avoided or undertaken such practice (or recognized that it was rightfully undertaken or avoided by others) out of a sense of legal right or obligation.[241]

Accordingly, it can be argued that the second element of the customary international law, acceptance as law (*opinio juris*), exists in the context of UJ due to the fact that the adoption of UJ by national legislations of significant number of states has proved the existence of *opinio juris* in the context of UJ. Additionally, diplomatic representatives have stressed that UJ is a legal principle permitted by international law to fill the gap of impunity.

In light of the above analysis, it is clear that UJ is permitted as a legal principle, however, it is not clear whether it is permitted as a legal right or as a legal obligation. In fact, the issue that arises is whether UJ is accepted as a legal right or as a legal obligation. In order to discuss the above issue, the relationship between UJ and *jus cogens* and obligations *erga omnes* should be discussed. Since most crimes under UJ are considered a violation of *jus cogens*.[242] In addition, the violation of such *jus cogens* will generate an obligation *erga omnes* to ensure that those accused of committing such crimes should not go unpunished.[243] Accordingly,

[238] The 46 states out of 72, see (n 18).
[239] Report of the UN Secretary-General, (n 17), para 4-9, p. 3-4.
[240] H. Thirlway, *The Sources of International Law,* (Oxford, Oxford University Press, 2014), 58-70.
[241] Draft conclusions on the identification of customary international law, (n 178), Conclusion 10, commentary 4, p 141.
[242] International Law Commission, Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Seventy-first session (2019), Doc. No A/CN.4/727, 31 January 2019.
[243] Mahmoud Cherif Bassiouni, (n 61), 63.

discussing the relationship between UJ, *jus cogens* and obligations *erga omnes,* will help to determine whether UJ is accepted as a legal right or as a legal obligation.

4.2.2.1.1: The Relationship between UJ, *Jus Cogens* and Obligations *Erga Omnes*.

First of all, *jus cogens* norms are peremptory international norms that are superior to any law or agreement between States.[244] Therefore, it has been claimed that any violation of these norms shall be considered null and void.[245] In this matter, Article 53 of the Vienna Convention on the Law of Treaties provided that

> *[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.*[246]

Accordingly, there is almost unanimous agreement that some violations of certain international conventions are considered an international crime such as war crimes and genocide.[247] In addition, these crimes are considered to be *jus cogens* norms.[248] This view is based on the international custom derived from the practice of States and supported by opinions of jurists.[249] For instance, the ICJ argued that "the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)".[250]

Consequently, it was claimed that the international obligation to take legal action to deter the perpetrators of these violations is compulsory under international law.[251] Additionally, it was argued that the violation of the *jus cogens* norms would generate an international obligation to all States to take the necessary legal measures to punish the perpetrators of

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[244] Ibid, 72.
[245] Robert Kolb, *Peremptory International Law - Jus Cogens a General Inventory*, (Oxford, Hart Publishing, 2015), 25.
[246] Vienna Convention on the Law of Treaties, (n 105), Art 53.
[247] Mahmoud Cherif Bassiouni, (n 24), 119. See also William A. Schabas, (n 106).
[248] Michael Scharf, 'The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position', (2001) 64 Law and Contemporary Problems 67, 87.
[249] Rubin Alfred, (n 60), 268.
[250] Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), (n 108), para 99.
[251] Christian Tomuschat and Jean-Marc Thouvenin, eds, (n 108) 300. See also Mari Takeuchi, *Modalities of the Exercise of Universal Jurisdiction in International Law,* (PhD Thesis *University of Glasgow 2014) 59-65.*

such a violation.[252] The obligation resulting from the violation of the j*us cogens* norms is called *erga omnes* obligations,[253] which is defined as the obligation of all States towards the international community as a whole.[254] This term was mentioned and defined by the ICJ as follow

> *In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes*.[255]

However, the doctrinal views are different in determining the nature of the obligations *erga omnes*.[256] In this regard, a significant number of scholars argue that *erga omnes* obligations and *jus cogens are* two sides of the same coin.[257] However, scholars like Bassiouni believe that *erga omnes* obligations and *jus cogens* are different.[258] In this matter, he argued that *"Jus cogens refers to the legal status that certain international crimes reach, and obligatio erga omnes pertains to the legal implications arising out of certain crime's characterization*"[259]

In fact, it was argued that the *jus cogens* norm would give rise to legal obligations to all States. The first is that the jus cogens norm must not be violated.[260] Secondly, in the case of a violation of the *jus cogens*, all States should take the necessary legal measures to prevent the perpetrators of such violations from impunity.[261] Accordingly, it can be argued that the obligations that generate from the violation of *jus cogens* norm can be described as an *erga omnes* obligation.[262] This point of view was adopted by the ICJ in the case of Habre. In this

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[252] The case of Almonacid-Arellano et al v. Chile, Judgment of September 26, 2006 (Preliminary Objections, Merits, Reparations and Costs), Inter-American Court of Human Rights, Issue 154, para 114. See also Robert Kolb, (n 245), 106.
[253] Mahmoud Cherif Bassiouni, (n 243), 63.
[254] Rubin Alfred, (n 249), 277.
[255] Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, p. 3. Barcelona Traction, Light and Power Company, Limited, (Belgium V. Spain) Second Phase, at 32. [hereinafter Case Concerning Barcelona Traction].
[256] Jarat Chopra, 'Establishing Universal Jurisdiction', (1999) 6 The Brown Journal of World Affairs 3, 5.
[257] Mahmoud Cherif Bassiouni, (n 243), 72. See also Petra Baumruk, (n 112) 84.
[258] Ibid, 72.
[259] Ibid, 63.
[260] Jarat Chopra, (n 256), 4-5.
[261] Rubin Alfred, (n 249), 272; Draft Articles on Responsibility of States for internationally wrongful acts, (n 198), Art 41(1), p 113.
[262] Ibid, 277-278. See also Mahmoud Cherif Bassiouni, (n 243), 63. See also Mark A. Summers, (n 155), 95.

matter, the court stated that torture has become part of *jus cogens* under customary international law. Accordingly, all states have obligations *erga omnes* to prosecute violators of *jus cogens*.[263]

Regarding UJ, the practice of UJ has relied on the fact that the crimes committed have violated the *jus cogens*.[264] As mentioned in third chapter, these crimes involve piracy, slavery, war crimes, genocide, crimes against humanity and torture. In fact, it has been emphasised on more than one occasion that these crimes are considered to be a violation of peremptory norms under international law. For instance, the ICJ argued that "the prohibition of torture is part of customary international law and it has become a peremptory norm (jus cogens)".[265]

As another example, piracy is considered to be a violation of jus cogens, due to the fact that it violates the freedom of the high seas.[266] In this matter, Professor Oppenheim argued that any treaty supporting piracy will be voided for being contrary to the Peremptory norm.[267] in addition, several members of the ILC pointed out in the commentaries of the ILC during the 15th session 1963 and the 18th session 1966 that piracy, trade in slaves, or genocide could be cited as clear examples for violation of *jus cogens*.[268]

Accordingly, the common factor among the above-mentioned crimes is the fact that such crimes constitute a violation of *jus cogens*. This violation generates an international obligation in all States to take the necessary legal procedures against the perpetrators of these crimes.[269] Here, States' practice has shown that UJ is considered a form of fulfilling this obligation if the accused is present in the territory of state.[270] Consequently, it was argued that all States must

[263] Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), (n 108), para 119; Case Concerning Barcelona Traction, (n 255), 32. See also Robert Kolb, (n 245), 106.
[264] Christian Tomuschat and Jean-Marc Thouvenin, eds, (n 108), 269.
[265] Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), (n 108), p. 457.
[266] Kamrul Hossain, 'The Concept of Jus Cogens and the Obligation Under The U.N. Charter', (2005) 3 Santa Clara Journal of International Law 72, 74.
[267] Robert Jennings and Arthur Watts, *Oppenheim's International Law: Vol. 1 Peace*, (9th ed. London: Longman Pearson 1992) 528.
[268] Report of the International Law Commission, Fifteenth Session, 1963, Official Records of the General Assembly, Eighteenth Session, Supplement (A/5509), Extract from the Yearbook of the International Law Commission: 1963, vol. II A/CN.4/SER.A/1963/ADD.1, p 199. See also Report of the International Law Commission, Eighteenth Session, 1966, Official Records of the General Assembly, Twenty-first Session, Supplement No. 9 (A/6309/Rev.1), Extract from the Yearbook of the International Law Commission:1966, vol. II A/CN.4/SER. A/1966/Add. 1, p 248.
[269] Rubin Alfred, (n 249), 277-278. See also Roger O'Keefe, (n 10), 811-812. See also Robert Kolb, (n 245), 106.
[270] Draft Articles on Responsibility of States for internationally wrongful acts, (n 198), Article 41(1) ''States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40".

always adopt the necessary legislation to permit the exercise of UJ over the above mentioned crimes.[271] In the circumstance that the accused is present in the territory of a State, and this state decides to not extradite the accused, it cannot invoke, to justify a failure to prosecute, the absence of the traditional link of jurisdiction to prosecute defendants on their territory.[272] As all States in such a situation are bound to exercise UJ, so the exercise of UJ must always be regulated by their national law.[273] Therefore, the practice of UJ is determined by the fact that exercise UJ is a legal obligation.

In general, it can be concluded that the common denominator between these three principles is that there are some crimes under international law that are classified as a violation of *jus cogens*, so they must be punished.[274] Specifically, the obligation generated as a result of committing such crimes is described as an *erga omnes* obligation.[275] Accordingly, the exercise of UJ is classified as a manifestation of the fulfilment of this obligation.[276]

4.3: Preconditions to the Exercising of UJ

Based on states' practice, it can be observed that UJ is not automatically applicable to cases of war crimes, genocide, crimes against humanity and torture,[277] but rather, there are a number of conditions that must be met to exercise UJ. For example, the accused must be present in the territory of the state that intends to exercise UJ. Secondly, the exercise of UJ should be a subsidiary to the criminal jurisdiction of other States. Thirdly, the exercise of UJ should not violate the immunity of serving officials.

[271] Amnesty International, (n 3), 7.
[272] Xavier Philippe, 'The principles of universal jurisdiction and complementarity: how do the two principles intermesh?' (2006) 88 International Review of the Red Cross 375, 385.
[273] Amnesty International, (n 3), 7.
[274] Roger O'Keefe, (n 10), 811-812. Ademola Abass, (n 7), 351.
[275] Mahmoud Cherif Bassiouni, (n 243), 63.
[276] Malcolm Shaw, (n 91) 671-674; Paul Donovan Arnell, (n 91), 78; Xavier Philippe, (n 272), 385.
[277] The crime of piracy is not among the crimes that are subject to these preconditions to exercise universal jurisdiction. This is due to the fact that the exceptional nature of the crime of piracy which involves the following: Firstly, it is committed on the high seas, which is an area outside the territorial sovereignty of any state. Therefore, it is exempted from meeting the requirement of the presence of the accused as a precondition for exercising universal jurisdiction. Also, piracy is committed by private ships or aircraft to achieve private ends. Accordingly, the exercise universal jurisdiction over the crime of piracy does not require respect for diplomatic immunities because the act will not be classified as a crime of piracy if committed by persons with diplomatic immunity.

On the other hand, current State practice suggests that there no State permits the exercise of absolute UJ over the above-mentioned crimes.[278] In fact, all attempts by States to override the preconditions for the exercise of UJ have been failed. As mentioned above, some states, such as Belgium and Spain, have allowed absolute UJ in their legal system before it was amended.[279] In fact, they attempted to authorise the exercise of UJ in absentia. In addition, they attempted to authorise the exercise of UJ over current holders of diplomatic immunity. However, all these attempts have failed due to legal and political problems.

Accordingly, this section discusses the preconditions required to meet the exercise of UJ. During the discussion of these preconditions, there is also a focus on the legal and political problems that faced the attempts to exercise absolute UJ in order to find out whether such problems could be overcome. It is worth mentioning that the methodology employed is doctrinal legal research which "asks what the law is in a particular area".[280] This approach requires an initial discussion of the law as law rather than discussing the law according to what the law should be. As Michael Pendleton argues: "In Law, and in the humanities and social sciences generally, it may seem that one does not 'discover new truths' but that one merely reviews and analyses (or synthesises) past and present social phenomena".[281] In this regard, one of the most important mistakes in the previous studies on the concept of UJ has been the study of the subject on the basis of what the law should be *(de lege ferenda)* rather than what the law is (*de lege lata*).[282] This approach has caused confusion regarding the concept of UJ. Accordingly, this section aims to define the legal framework for UJ derived from customary international law, supported by State practice. Thus, the preconditions for UJ are drawn from state practice.[283] During the analysis of these preconditions, the discussion will also focus on issues of diplomatic immunity and the exercise of UJ in absentia.

[278] Fannie Lafontaine, (n 31), 1285.
[279] Ryan Rabinovitch, (n 77), 513. See also Maximo Langer, (n 10), 247.
[280] Mike McConville and Wing Hong Chui (eds), *Research Methods for Law*, (Edinburgh University Press 2007) 19. See also Muath Al-Zoubi, *An Analysis of the Crime of Trafficking in Persons under International Law with a Special Focus on Jordanian Legislation*, (PhD Thesis Brunel University London 2015) 7.
[281] Michael Pendleton, 'Non-empirical Discovery in Legal Scholarship – Choosing, Researching and Writing a Traditional Scholarly Article', in Mike McConville and Wing Hong Chui, *Research Methods for Law*, (Edinburgh University Press 2007) 161.
[282] Noora Arajärvi, (n 187), 168.
[283] Report of the UN Secretary-General, (n 23), para 63-100, p 13-20.

4.3.1: The Presence of the Accused in the Territory of the State

The first precondition is the presence of the accused in the State that intends to exercise UJ, which is an express requirement in most countries.[284] It is worth mentioning that the Princeton Principles proposed in Article 2 (3) that UJ may be exercised in absentia.[285] In practice, however, there is no legal basis in international law for such a proposal. Though several States adopted UJ in absentia in their domestic legislation, they subsequently amended their laws to exclude allowing such jurisdiction in absentia.[286] Hence, the discussion will now focus on the impediments to exercising UJ in absentia.

4.3.1.1: Impediments to the Exercise of UJ in Absentia

States' exercising of UJ in absentia has been the subject of severe criticism.[287] The absence of a legal basis is one key area of criticism.[288] In this regard, it was argued that the exercise of UJ in absentia is unknown in international law as there is no legal basis for supporting UJ in absentia. [289] Additionally, Judge van den Wyngaert argued that "[a] practical consideration may be the difficulty in obtaining the evidence in trials of extraterritorial crimes. Another practical reason may be that States are afraid of overburdening their court system".[290]

As mentioned previously, customary international law has not recognised UJ in absentia because a lack of state practice.[291] Indeed, most states do not allow the exercising of UJ in absentia.[292] Equally, there is no legal provision under international law that allows UJ in absentia.[293] Though the principle of *aut dedere aut judicare* was invoked to justify the exercise of UJ in absentia, this drew significant criticism. In this matter, critics of UJ in absentia consider that such jurisdiction is based on an inaccurate interpretation of the provisions of international law,[294] as this interpretation goes beyond the scope of *aut dedere aut*

[284] Ibid. See also Olympia Bekou and Robert Cryer, (n 8), 56.
[285] The Princeton Principles on Universal Jurisdiction, (n 107), art 2 (3).
[286] Roger O'Keefe, (n 10), 814.
[287] Observations by Permanent Mission of Spain to the UN, (n 80). See also Máximo Langer, (n 71), 40. See also Katherine Gallagher, (n 75), 1113-1114.
[288] Separate Opinion of President Guillaume, (n 153).
[289]Ibid.
[290] Dissenting opinion of judge van den Wyngaert, ICJ, Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment, Feb. 14, 2002), para 56.
[291] Fannie Lafontaine, (n 31), 1283.
[292] ZHU Lijiang, (n 148), 217.
[293] Mark A. Summers, (n 155), 67-70.
[294] Pavel Caban, (n 11), 185. See also Fannie Lafontaine, (n 31), 1285.

judicare.[295] In fact, the principle of *aut dedere aut judicare* consists of two obligations which are *aut dedere* (extradition) and *aut judicare* (prosecution). Regarding *aut judicare*, the concept cannot be expanded to justify the exercise of UJ in absentia, because the presence of the accused is a condition of this obligation.[296] In fact, if the accused present on territory of state, the obligation based on the concept of *aut judicare* opens the door to only two possibilities.[297] Firstly, the exercise of criminal prosecution based on traditional links of jurisdiction.[298] Secondly, in the absence of the traditional basis of jurisdiction, criminal jurisdiction can be exercised based on the universality principle if the accused is in the territory of the state.[299] Accordingly, there is no obligation on the State if the accused is not present in its territory.

On the other hand, there is the concept of *aut dedere*, which involves the action of extradition or demanding of extradition. Here, if the accused is present in territory of a state, the state may extradite the accused to another state to be prosecuted. In contrast, states in which the accused is not present may only demand extradition on the basis of *aut dedere*. However, they cannot exercise jurisdiction in absentia in accordance with the principle of universality due to the fact that the concept of *aut dedere* cannot be extended beyond its limitations, which is the mere demanding of extradition or the act of extradition.

Accordingly, it is clear that UJ is quite distinct from the obligation to prosecute or extradite, the implementation of which is subject to limitations and conditions set out in a specific treaty.[300] In addition, though it has been argued that UJ contain a criterion for the attribution of jurisdiction, whereas the obligation to prosecute or extradite is an obligation that is discharged once the accused is extradited, or once the State has decided to prosecute based on any of the available bases of jurisdiction.[301] In light of the above analysis, it can be argued that the principle of *aut dedere aut judicare* cannot be relied upon to justify UJ in absentia.

[295] Eugene Kontorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation', (2004) 45. Harvard International Law Journal 183, 191. See also Mari Takeuchi, (n 251), 57.
[296] Separate Opinion of President Guillaume, (n 153). See also Pavel Caban, (n 11), 190.
[297] Ryngaert Cedric, (n 109) 52. See also Paola Gaeta, (n 109), 908.
[298] Theodor Meron, (n 133), 569; Peter Weiss, (n 217), 407; Anthony J. Colangelo, (n 110), 150.
[299] Petra Baumruk, (n 112) 49.
[300] Report of the UN Secretary-General, (n 17), para 18, p. 6.
[301] Ibid, para 19, p. 7.

Additionally, there are multiple practical issues with UJ in absentia.[302] Firstly, UJ in absentia was unable to achieve the desired justice as the defendants were in other countries that refused to extradite them. Equally, a state exercising UJ in absentia may be unable to collect evidence from the crime scene and verify the validity of the accusations.[303] Consequently, exercising UJ in absentia may not be an effective method for achieving international justice.[304] Hence, the legal logic and actual practice of states proved the failure of exercising UJ in absentia.[305] Accordingly, it was argued that UJ should be exercised only when the perpetrators of international crimes are present in their territory.[306] As a consequence of these legal and practical problems, most States that have exercised UJ in absentia have found themselves compelled to modify their laws to limit the exercise of UJ.[307] Thus, the presence of the accused on the soil of the State is precondition for the exercise UJ.

4.3.1.2: Challenges to the Presence of the Accused as a Precondition for UJ

It is worth mentioning that there are some challenges that arise regarding the presence of the accused as a precondition for UJ. The first issue is whether the accused present in the territory of the state is there voluntarily or has been forcibly removed there. In this matter some countries have exercised UJ over an accused present in its territory following kidnap from another country.[308] For instance, Adolf Eichmann was kidnapped from Argentina and transferred to Israel to be tried for genocide committed against Jewish people during the Second World War.[309] Eichmann's abduction was criticised for violating his rights. In fact,

[302] Anthony J. Colangelo, 'The New Universal Jurisdiction: In Absentia Signaling over Clearly Defined Crimes', (2005) 36 Georgetown Journal of International Law 537, 543.
[303] Dissenting opinion of Judge van den Wyngaert, (n 290), para 44.
[304] Ibid.
[305] Olympia Bekou and Robert Cryer, (n 8), 56. See also Pavel Caban, (n 11), 185. See also Fannie Lafontaine, (n 31), 1285.
[306] Petra Baumruk, (n 112), 66.
[307] Olympia Bekou and Robert Cryer, (n 8), 56.
[308] PDD-39 U.S. Policy on Counterterrorism was signed on 21 June 1995 by President Clinton, declassified in 1997, available at https://fas.org/irp/offdocs/pdd/pdd-39.pdf [accessed 20 May 2020]. See also United States v. Humberto Álvarez-Machaín, 504 U.S. 655 (1992) 112 S. Ct. 2188; 119 L. Ed. 2d 441. In the Alvarez-Machin case, the US Supreme Court ruled that the forcible abduction of the respondent does not prohibit his trial in the US. So, the United States courts have jurisdiction to try the defendant criminally even if the defendant was kidnapped from a foreign country against his will by US agents. See also Amnesty International, USA: Abduction in Libya violates human rights, undermines rule of law US Special Forces seize al Qa'ida suspect from street in Tripoli, 7 October 2013, Index: AMR 51/065/2013, available at https://www.amnesty.nl/content/uploads/2016/11/usa_abduction_in_libya_violates_human_rights_undermines_rule_of_law.pdf?x83901 [accessed 20 May 2020].
[309] Attorney-General of Israel v Adolf Eichmann (Supreme Court of Israel) Case No. 336/61, 29 May 1962, 36 ILR. See also UN Security Council, Security Council resolution 138 (1960) [Question relating to the case of Adolf

abduction affects the legality of arrest proceedings and violates standards of human rights. Hence, most of states impose certain conditions of arrest, search and trial procedures as legal safeguards to protect the rights of the accused in order to achieve justice.

Equally, abduction has been strongly criticised for violating the sovereignty of other States.[310] In this regard, the achievement of international justice by a state through interference and the violation of the sovereignty of another state may turn international law into the law of the jungle, as was described by Judge Bula-Bula.[311] It is worth mentioning that such violation can be avoided through international cooperation between states. So, instead of kidnapping the accused, states can cooperate with each other through extradition treaties. The presence of the accused on the territory of the State after being legally surrendered by another State is acceptable and sufficient to fulfil the condition of the presence of the accused.

In this matter, a distinction must be made between the extradition of the accused persons and the abduction of the accused persons without the knowledge of States. The former is permissible internationally under the principle of *aut dedere aut judicare*. By contrast, kidnapping is internationally illegal due to the fact that it violates the rights of the accused and the sovereignty of other States. Judge Rezek confirmed the importance of corporation between states and avoiding the misuse of UJ by emphasising "the importance of restraint in the exercise of criminal jurisdiction by domestic courts; a restraint in line with the notion of a decentralized international community, founded on the principle of the equality of its members and necessarily requiring mutual coordination."[312] In fact, Judge Rezek's view calls for avoiding all forms of misuse of UJ and replacing it with international cooperation among States. In light of the above analyses, it is clear that the abduction of the accused and bringing them to countries for the exercising of UJ does not meet the requirement for the presence of the accused.

Eichmann], 23 June 1960, S/RES/138 (1960), available at: http://www.refworld.org/docid/3b00f1cc74.html [accessed 24 May 2017

[310] Anthony J. Colangelo, (n 302), 550. See also Pavel Caban, (n 11), 185.

[311] Separate opinion of Judge Bula-Bula, in Summaries of Judgments, Advisory Opinions and Orders of The International Court of Justice (1997-2002), Publications ST/LEG/SER.F/1/Add.2, UN, 2003, p 217.

[312] Separate opinion of Judge Rezek, in Summaries of Judgments, Advisory Opinions and Orders of The International Court of Justice (1997-2002), Publications ST/LEG/SER.F/1/Add.2, UN, 2003, p 217.

The second issue that arises concerns the differences between States in interpreting the condition of the presence of the accused. In this matter, some countries have been lenient in interpreting this condition by considering the possibility of future presence as a pretext for UJ. For instance, in South Africa the condition of the presence on the territory was interpreted loosely by the Constitutional Court. Accordingly, the possibility of being present in the territory of the State is sufficient to exercise UJ in South Africa.[313] On the other hand, other states such as France overinterprets the interpretation of the presence of the accused as it requires the "habitual residence" of the suspect in France to exercise the UJ.[314] As noted above, this requirement means that if the accused are present in the territory of the state for a short period as tourists, they cannot be detained.[315]

Both approaches are open to critique. Firstly, the research does not support the South African position due to the fact that this may be misused to justify UJ in absentia. However, the French requirement of "habitual residence" as a legal criterial prevents UJ from playing its role in filling the gap of impunity. Thus, the presence of the accused in the territory of the state should be enough to exercise UJ.[316] As Georges Abi-Saab argued: “it would be self-defeating to add conditions which would render universal akin to a traditional connecting factor, and thus lose its specificity and raison d'etre.”[317] Accordingly, the condition will be fulfilled once the accused is present in the territory of the state, which is sufficient as a pretext for exercising UJ.

In light of the above analyses, it can be concluded that there is no legal basis to justify the exercise of UJ in absentia.[318] In addition, there are practical problems that prevent such practice, such as the difficulty of reaching the crime scene and collecting evidence to confirm the validity of the accusations. Accordingly, UJ should be exercised only when the perpetrators of international crimes are present in their territory of the states. In this matter, the mere presence of the accused on the states’ territory is sufficient to exercise UJ and there

[313] Constitutional Court of South Africa, (n 35). See also Fannie Lafontaine, (n 31), 1284.
[314] Rahim Hesenov, (n 83), 282.
[315] Human Rights Watch, (n 22).
[316] Georges Abi-Saab, ‘The Proper Role of Universal Jurisdiction’, (2003) 1 Journal of International Criminal Justice 596, 596.
[317] Ibid.
[318] Eugene Kontorovich, (n 295), 191. See also Mari Takeuchi, (n 251), 57.

is no need to require anything else.[319] Otherwise, it would diminish the characteristics of UJ and eliminate its effective role in the fight against impunity.

4.3.2: The Exercise of UJ should not Violate the Immunity of Current Officials

Diplomatic immunity is defined as the protection of certain persons from prosecution for acts committed by them during the term of their official functions.[320] It derives from the provisions of international law that serving diplomats and heads of State and government are not prosecuted under the national laws of the other States.[321] Indeed, this immunity has been recognised under customary international law for a long time.[322] In addition, it was codified under the conventional international law at the Vienna Conference on Diplomatic Relations, 1961.[323] In practice, most national courts have stressed the need to respect diplomatic immunity and it has been confirmed that the holders of diplomatic immunity, such as heads of state, prime ministers and foreign ministers, during the performance of their functions enjoy temporary procedural immunity from the national criminal jurisdiction of foreign states.[324]

Regarding UJ, it was observed that the exercise of UJ was not an exception because it did not detract from the need to respect diplomatic immunity. For instance, the Spanish permanent mission to the UN stated that in many cases criminal proceedings based on UJ did not progress very far due to the fact that the accused persons enjoyed immunity from national criminal jurisdiction, as in the cases of Hugo Chávez, Paul Kagame, Hassan II, Fidel Castro, and Teodoro Obiang Nguema.[325] Additionally, many states have stressed that the exercise of UJ by national

[319] Georges Abi-Saab, (n 316), 596.
[320] Ilias Bantekas and Susan Nash, *International Criminal Law*, (2nd edn, Cavendish Publishing Limited, 2003) 168. See also William Schabas, *Genocide in International Law: The Crimes of Crimes*, (1st edn, Cambridge University Press, 2000) 316-317.
[321] Malcolm Shaw, (n 91), 735-740.
[322] Yoram Dinstein, 'Diplomatic Immunity from jurisdiction Ratione Materiae', (1966) 15 The International and Comparative Law Quarterly 76, 78-80. See also Paul Donovan Arnell, (n 91), 24.
[323] Vienna Convention on Diplomatic Relations, United Nations,18 April 1961, UN. R.NO 7310, 1964.
[324] See Re Mofaz, United Kingdom, Bow St. Magistrates' Court, the judgment of 12 February 2004, ILR, vol. 128, p. 712. See also Tatchell v. Mugabe, United Kingdom, Bow St. Magistrates' Court, the judgment of 14 January 2004, ILR, vol. 136, p. 573. On the basis of immunity arguments, national courts in the UK have rejected arrest warrant requests against Robert Mugabe President of Zimbabwe and Gen. Shaul Mofaz, defence minister of Israel.
[325] Hugo Chávez, Spain, National High Court, Central Investigation Court No. 4, of 24 March 2003; Paul Kagame, Spain, National High Court, the decision of case No. 3/2008, of 6 February 2008; Teodoro Obiang Nguema and

courts is conditional on the need to respect diplomatic immunity.[326] There is no legal rule under customary or conventional international law that permits the national courts of foreign states to exercise criminal jurisdiction over the holders of diplomatic immunity.

It is worth mentioning that several States like Belgium Spain and the UK have attempted to override diplomatic immunity in the exercise of UJ, however, all of these attempts have failed due to the fact that there is no legal rule under customary or conventional international law that permits the national courts of foreign states to exercise criminal jurisdiction over the holders of diplomatic immunity. In fact, these states faced legal problems as a result of the contradiction between the exercise of UJ and the duty to respect diplomatic immunity.[327] In this regard, Belgium exercised absolute UJ and issued an arrest warrant against the Minister of Foreign Affairs in Congo Mr. Abdulaye Yerodia Ndombasi.[328] This issue was referred by Congo to the ICJ,[329] and Congo objected on the grounds that the accused enjoyed diplomatic immunity.[330] Accordingly, the ICJ concluded that Belgium violated its international obligation to respect the immunity of a minister by issuing the arrest warrant.[331] The reason for this view is that the holders of the diplomatic immunity are representatives of their countries, so they have temporary procedural immunity from the criminal jurisdiction of national courts of foreign states. In addition, there is no international rule allowing national courts to exercise their jurisdiction over persons with diplomatic immunity. This point of view is frequently justified on the grounds of non-interference in internal affairs and the sovereign equality of

Hassan II, Spain, National High Court, the decision of Central Investigation Court No. 5, of 23 December 1998. See also Fidel Castro, Spain, National High Court, Criminal Chamber, decision 1999/2723, of 4 March 1999. See also Observations by Permanent Mission of Spain to the UN on the scope and application of the principle of universal jurisdiction, the 71st session, the Sixth Committee of UN, (2016), available at <https://www.un.org/en/ga/sixth/71/universal_jurisdiction/spain_e.pdf> [accessed 20 July 2020].

[326] Report of the UN Secretary-General, (n 23). See also ZHU Lijiang, (n 148), 218.

[327] Gabriel Bottini, 'Universal jurisdiction after the creation of the International Criminal Court', (2004) 36 New York University Journal of International Law and Politics 503, 507.

[328] Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), International Court of Justice (ICJ), 14 February 2002, pp 70, available at http://www.icj-cij.org/docket/files/121/8126.pdf [hereinafter Arrest Warrant Case].

[329] Ibid.

[330] Summaries of Judgments, Advisory Opinions and Orders of The International Court of Justice (1997-2002), Publications ST/LEG/SER.F/1/Add.2, UN, 2003, p 208.

[331] Ariel zemach, 'Reconciling Universal Jurisdiction with Equality Before the Law', (2011) 47 Texas International Law Journal 143, 159.

States, as well as the need to ensure the independent performance of diplomats and the stability of international relations, all of which have a bearing on immunity.[332]

It is worth mentioning that the judgment of the ICJ had a significant impact in determining the relationship between the principle of UJ and the need to respect the principle of diplomatic immunity and several judgments have been issued by national courts followed suit the judgment of the ICJ.[333] For instance, in 2004 the US Court of Appeal ruled the need to respect the immunity of foreign heads of state in cases against Chinese President Jiang Zemin and Zimbabwean President Robert Mugabe.[334] In addition, as consequence of the ICJ judgement the national legislation authorizing the exercise of UJ over the holders of diplomatic immunity has been amended in several countries, including Belgium.[335] In this regard, legal amendments were made by the Belgian Legislature in 2003 and provided that suspects cannot be arrested if they are an official guest of the Government or a worker of an international organisation located on Belgian territory.[336] Hence, it is useful now to discuss the case of Congo against Belgium in order to draw from it the relationship between UJ and the principle of diplomatic immunity.

In this case, the ICJ focused on immunity of Minister of Foreign Affairs in Congo from foreign criminal jurisdiction and highlighted the following issues:[337] firstly, it questioned whether jurisdiction could be exercised by an international court or a national court.[338] In this matter, the ICJ stressed that immunity is not an obstacle to the exercise of criminal jurisdiction by international courts,[339] due to the fact that the previous international practices have proven that a person with diplomatic immunity may be tried before an international tribunal, if he or

[332] International Law Commission, sixty-fourth session Geneva (2012), Preliminary report on the immunity of State officials from foreign criminal jurisdiction, Prepared by Special Rapporteur Ms. Concepción Escobar Hernández, A/CN.4/654, 31 May 2012, para 9, p 4.
[333] Report of the International Law Commission, 58th session, (1 Aug 2006), Doc. No. A/61/10, Annex A, Immunity of State officials from foreign criminal jurisdiction, by (Mr. Roman A. Kolodkin), p 437.
[334] Ibid. See also Sarah Andrews, 'U.S. Courts Rule on Absolute Immunity and Inviolability of Foreign Heads of State: The Cases against Robert Mugabe and Jiang Zemin', (2004) 8 American Society of international law.
[335] Jana Panakova, (n 7), 61.
[336] Sienho Yee, (n 69), 522.
[337] Arrest Warrant Case, (n 328), paras. 47-55, p 18-20.
[338] Summaries of Judgments, (n 330), p 213. See also Dapo Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits', (2003) 1 Journal of International Criminal Justice 618, 640.
[339] Ibid

she is charged with one of the most serious international crimes.[340] This was the case at the International Military Tribunal of Nuremberg and Tokyo and the International Criminal Tribunal for the former Yugoslavia and Rwanda, as well as the ICC.[341] It is worth noting that the possibility of prosecuting the holders of diplomatic immunity before international tribunals was based on explicit provisions in the statutes of these tribunals and courts.[342] On the other hand, regarding national courts, the ICJ argued that diplomatic immunity should not be overridden if the trial is taken before a national court.[343] This point of view is frequently justified on the ground that there are no customary or conventional international rules that allow the exercise of criminal jurisdiction by a national court of a State over the holders of diplomatic immunity from another States during the performance of their functions.[344] Recently, this point of view has been confirmed by the ICC in its decision on case of Sudanese President Omar Hassan al-Bashir. In this matter, the ICC confirmed that

> *The Appeals Chamber notes that Head of State immunity, which has been asserted in the case at hand, is a manner of immunity that is, as such, accepted under customary international law. That immunity prevents one State from exercising its criminal jurisdiction over the Head of State of another State. It is important to stress that immunity of that kind operates in the context of relations between States.*[345]

[340] Mahmoud Cherif Bassiouni, (n 24), 84-86. See also Ademola Abass, (n 7), 350.

[341] Arrest Warrant Case, (n 328), para 48, p 18. See also Antonio Cassese, *International Criminal Law*, (1st edn, Oxford University Press, 2003), 267–271. See also LIU Daqun, 'Has Non-Immunity for Heads of State Become a Rule of Customary International Law?', in Morten Bergsmo and Ling Yan (eds), *State Sovereignty and International Criminal Law,* (Beijing: Torkel Opsahl Academic EPublisher, 2012), 63.

[342] See Nuremberg Charter, (Charter of the International Military Tribunal) (1945), The London Agreement of 8 August 1945, art 7. See also Tokyo Charter, International Military Tribunal for the Far East Charter (IMTFE Charter) Special proclamation by the Supreme Commander for the Allied Powers at Tokyo January 19, 1946; Treaties and Other International Acts Series N. 1589, art 6. See also ICTY Statute, (n 19), art 7. See also ICTR Statute, (n 19), art6; Rome Statute (n 19), art 27.

[343] Arrest Warrant Case, (n 328), para 47-55, p 18-20.

[344] JIA Bingbing, 'Immunity for State Officials from Foreign Jurisdiction for International Crimes', in Morten Bergsmo and Ling Yan (eds), *State Sovereignty and International Criminal Law,* (Beijing: Torkel Opsahl Academic EPublisher, 2012), 79.

[345] ICC, The Appeals Chamber, Situation in Darfur, Sudan in the case of the Prosecutor V. Omar Hassan Ahmad Al-Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal, No. ICC-02/05-01/09 OA2, 6 May 2019, para 101, at 52-53. It is worth mentioning that Jordan invoked article 98 of the Rome Statute, which allowed states to respect the diplomatic immunities recognized under international law of non-states parties to the ICC. It also argued that the Security Council resolution 1593 referred only the Sudanese situation to the ICC but did not state that the Court could exercise its international criminal jurisdiction over holders of diplomatic immunities, as in resolutions 827 and 955 that establishing the ICTY and ICTR. However, ICC argued that the State of Jordan has a legal obligation to arrest the Sudanese president and hand him over to the ICC, in order to implement its obligations under article 27, 86 and 89 of the Rome Statute. In this matter, Congo has another opinion, which confirmed that the immunity was waived implicitly by the Security Council resolution 1593. See Pre-Trial

Accordingly, the difference between an international criminal jurisdiction and UJ is that the exercise of international criminal jurisdiction over holders of diplomatic immunity is based on explicit provisions, while UJ lacks any international provision. The differences between an international criminal jurisdiction and UJ will be discussed more deeply in the next chapter. Generally, it can be observed that the exercise of UJ by national courts does not detract from the need to respect diplomatic immunity. This point of view is justified on the grounds of non-interference in internal affairs and the sovereign equality of States, as well as to ensure the stability of international relations.[346]

Secondly, the Court stressed that the need to respect diplomatic immunity does not mean the absence of jurisdiction. in this matter the court argued that "the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction".[347] It was argued that diplomatic immunity is a temporary procedural immunity from the national criminal jurisdiction of foreign states.[348] In fact, diplomatic immunity does not prevent the national courts from undertaking investigations.[349] Indeed, it has been argued that “the International Court of Justice does not consider that the immunity of a head of State from foreign criminal jurisdiction is an obstacle to any criminal procedures pursued by a foreign State”.[350] It is clear that the temporary prohibition from exercising UJ over holders of diplomatic immunity does not prevent States that receive complaints of international crimes from investigating such allegations.[351] Accordingly, the state can investigate and collect information and evidence on the validity of these allegations.[352] However, these preliminary investigations should not entail the arrest or

Chamber II, the decision on the cooperation of the Democratic Republic of the Congo regarding Omar Al Bashir’s arrest and surrender to the Court, No. ICC-02/05-01/09-195, 9 April 2014, para. 29.

[346] International Law Commission, (n 332), para 9, p.4.

[347] Summaries of Judgments, (n 330), p 213.

[348] International Law Commission, sixty-eighth session Geneva, fifth report on the immunity of State officials from foreign criminal jurisdiction, Prepared by Special Rapporteur Concepción Escobar Hernández, Doc. No. A/CN.4/701, 14 June 2016, para 66, p.33.

[349] Case concerning certain criminal proceedings in France (Republic of Congo v. France), International Court of Justice (ICJ), 17 June 2003, Request for the indication of a provisional measure, paras. 30-35.

[350] Report of the International Law Commission, (n 333), p. 446.

[351] Ibid.

[352] Case concerning certain criminal proceedings in France (Republic of Congo v. France), (n 349), paras. 30-35.

issuing arrest warrants against the holders of diplomatic immunity because such action would prevent them performing their duties.[353]

Thirdly, it was highlighted that diplomatic immunity is not granted to a person *per se* but to his or her status as representative of the State in order to carry out the duties entrusted to them.[354] Thus, the State can waive its right to diplomatic immunity for its representatives. It is clear that it is recognised among states for the interest of the State, not in the interest of the individual.[355] This point of view is justified on the grounds of non-interference in internal affairs and the sovereign equality of States, as well as the need to ensure the independent performance of their activities by States and the stability of international relations.[356]

In addition, the ICJ argued that diplomatic immunity must not be regarded as a means of impunity.[357] Accordingly, UJ should not be exercised over persons who have diplomatic immunity as official representatives of their State unless the State waives the right of immunity. This provision shall not apply to the former representatives of States who might have immunity. In this matter, it was described that high-ranking officials after leaving office can be subject to prosecution by foreign national courts.[358] Hence, diplomatic immunity only temporarily precludes the exercise of criminal jurisdiction in all its forms by foreign national courts.[359] However, once the accused is discharged from office as the representative of a State, there is no diplomatic immunity that may prevent the exercise of criminal jurisdiction.[360] To demonstrate this, recently the ICJ stressed that the former President of Chad, Habré, does not enjoy any immunity and may be tried for crimes before national courts.[361] In this matter, the court

[353] Arrest Warrant Case, (n 328), para 63-64, p 23.
[354] Summaries of Judgments, (n 330), para 45-71, p. 212.
[355] Ibid. See also Thomas M Franck, *The Power of Legitimacy Among Nations*, (1st edn, Oxford University Press, 1990) 57-59.
[356] International Law Commission, (n 332), para 9, p 4.
[357] Arrest Warrant Case, (n 328), paras. 60, p 22.
[358] Ilias Bantekas and Susan Nash, (n 320), 170-172.
[359] Jana Panakova, (n 7), 57.
[360] Arrest Warrant Case, (n 328), paras. 61, p 22.
[361] Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), (n 108), p. 422.

highlighted that In 1993, the subsequent Chadian Government removed Habré's immunity, so he could be prosecuted.[362]

In light of the above mentioned, it can be concluded that diplomatic immunity issue was and remains one of the most important legal dilemmas facing the exercise of UJ by national courts. This is due to the fact that the international crimes that can be subject to UJ are often committed by government officials or persons with a recognised official capacity.[363] However, such persons enjoy diplomatic immunity under international law.[364] In this matter, it was argued that immunity is not granted to a person per se but to his or her status as representative of the State when carrying out the duties entrusted to them.[365] Thus, UJ cannot be exercised over persons who have diplomatic immunity unless their State waives the right of immunity. Most states have stressed that the exercise of UJ by national courts is conditional on the need to respect diplomatic immunity.[366]

4.3.3: The Exercise of UJ should be a Subsidiary to Traditional Bases of Criminal Jurisdiction

It has been noted that UJ should be implemented in a subsidiary manner,[367] which means that UJ will be exercised only if the State in which the crimes are committed or the State in which the accused are national is unwilling or unable to prosecute the accused.[368] This is due to the fact that when international crimes are committed, priority is given to criminal jurisdiction based on traditional grounds such as territorial jurisdiction and national jurisdiction. Accordingly, UJ is exercised in the absence of an effective traditional criminal jurisdiction.

This point of view was stressed by the Institute of International Law:

> *Any State having custody over an alleged offender should, before commencing a trial on the basis of universal jurisdiction, ask the State where the crime was committed or*

[362] Ibid. See also Human Rights Watch, Chad Lifts Immunity of Ex-Dictator: Green Light to Prosecute Hissène Habré in Belgium, (December 5, 2002) available at <https://www.hrw.org/news/2002/12/05/chad-lifts-immunity-ex-dictator> [accessed on 27 June 2020].
[363] Ademola Abass, (n 7), 370.
[364] Report of the International Law Commission, (n 333), p 436.
[365] Summaries of Judgments, (n 330), para 45-71, p. 212.
[366] Report of the UN Secretary-General, (n 23). See also JIA Bingbing, (n 344) 79.
[367] ZHU Lijiang, (n 148), 217.
[368] Report of the UN Secretary-General, (n 23), para 155. See also Luc Reydams, The application of universal jurisdiction in the fight against impunity, European Parliament's Policy Department (2016), p 7. Available at SSRN: https://ssrn.com/abstract=2929013

the State of nationality of the person concerned whether it is prepared to prosecute that person, unless these States are manifestly unwilling or unable to do so.[369]

Therefore, a significant number of states emphasised that UJ shall be residual, complementary or subsidiary to the criminal jurisdiction of other States, including the national jurisdiction of the State whose national is a suspect of the crimes concerned and the territorial jurisdiction of the State where the crimes were committed.[370] In this matter, priority for exercising criminal jurisdiction was given to the states where the crimes were committed because they are closer to the aggrieved parties, they enjoy readier access to the evidence and they benefit most from the transparency of a trial, as well as the accountability of the verdict. However, if the territorial state is unwilling or unable to exercise its jurisdiction, UJ is permitted as a complementary mechanism to ensure that the accused does not enjoy a safe haven.[371]

This view was adopted by national legislations of several states. For instance, Article 8 of the Criminal Code of the Czech Republic stresses that UJ should be applied subsidiary to other criminal jurisdiction based on traditional grounds.[372] Additionally, German law requires the exercise of UJ only when the case in question is not being investigated by any national or international court.[373] According to Section 153f Para. 2 (esp. No. 4) of the German Code of Criminal Procedure,

the public prosecution office can, in particular, refrain from prosecuting an offence punishable pursuant to Sections 6 to 14 of the Code of Crimes against International Law, if [...] the offence is being prosecuted before an international court or by a

[369] Institute of International Law, (n 181), para 3(c).

[370] General Assembly, Sixth Committee, Summary Record of the 12th meeting A/C.6/64/SR.12 and Summary Record of the 13th meeting A/C.6/64/SR.13, General Assembly, Sixty-fourth session 25 November 2009. See also General Assembly, Sixth Committee, Summary Record of the 10th meeting 2010, A/C.6/65/SR.10 and Sixth Committee, Summary Record of the 11th meeting, A/C.6/65/SR.11, General Assembly, Sixty-fifth session, General Assembly, Sixty-fifth session, 14 January 2011. See also ZHU Lijiang, (n 148), 217.

[371] Chile, A/C.6/67/SR.12, para. 36 (2012); South Africa, A/C.6/67/SR.13, para. 3 (2012); Sri Lanka, A/C.6/67/SR.13, para. 20 (2012); Brazil, A/C.6/67/SR.13, para. 33 (2012); Norway, A/C.6/67/SR.12, para. 61 (2012); Azerbaijan, A/C.6/67/SR.13, para. 40 (2012); Mari Takeuchi, (n 251), 131.

[372] Criminal Code of the Czech Republic, Act No. 40/2009 Coll, of 8 January 2009, Sbirka zakonu, 2009-02-09, Castka 11, pp. 354-461, ISSN: 1211-1244, art 8.

[373] Máximo Langer, (n 71), 12. See also Human Rights Watch, The Legal Framework for Universal Jurisdiction in Germany, 2014, available at <https://www.hrw.org/sites/default/files/related_material/IJ0914German_0.pdf> [accessed on 25 May 2020].

state on whose territory the offence was committed, whose national is suspected of its commission or whose national was harmed by the offence.[374]

Consequently, the Federal Attorney-General refused to prosecute former US Secretary of Defence Rumsfeld who was accused of commissioning acts of torture in Iraq.[375] This decision was based on the subsidiarity principle mentioned in Section 153f Para. 2 (esp. No. 4),[376] as the Federal Attorney-General decided that the principle of subsidiarity prevented the prosecution of Rumsfeld because the US authorities had already opened an investigation.[377] Additionally, UJ could only be exercised if the Criminal Investigation was carried out without serious intent to prosecute. In this case there was no indication that the US authorities had aimed to shield the accused from criminal responsibility.[378]

As another example, Spain has adopted the subsidiarity as a guide for exercising UJ. In the case of Salah who was targeted and killed in his house in Gaza in 2002 and a further 14 innocent Palestinian civilians were killed by the Israel defence Forces,[379] it was asserted that UJ must be exercised only in the inactivity or absence of the desire to exercise traditional criminal jurisdiction. In this case, the Spanish National Court (Audiencia Nacional) accepted the practice of UJ because the measures taken by the State of Israel were not aimed at a real trial. In this regard, the Audiencia Nacional on 29th of January 2009 stated that Israel, which had territorial jurisdiction, had not shown intent to exercise its jurisdiction and therefore the Spanish judiciary may exercise UJ.[380] Then on 4th of May, the national court of Spain confirmed its decision that there was insufficient evidence to

[374] The German Code of Criminal Procedure, in the version published on 7 April 1987 (Federal Law Gazette I page 1074, 1319), as last amended by Article 3 of the Act of 21 June 2002 (Federal Law Gazette I page 2144), see Act to Introduce the Code of Crimes against International Law of 26 June 2002, (Völkerstrafgesetzbuch) Federal Law Gazette 2002, Part I., no. 42, 29 June 2002, pp. 2254-2260. Translation provided by the Federal Ministry of Justice, available https://germanlawarchive.iuscomp.org/?p=758

[375] Decision of the Federal Attorney General, 10 February 2005, File No. 3 ARP 207/04-2, published in Juristenzeitung (JZ) 2005, p. 311. English translation is reproduced in, Andreas Fischer-Lescano, 'Decision of the General Federal Prosecutor: Center for Constitutional Rights v. Rumsfeld', (2006) 45 International Legal Materials 115, 119-121.

[376] The German Code of Criminal Procedure, (n 374)

[377] Decision of the Federal Attorney General, (n 375). See also Kai Ambos, 'International Core Crimes, Universal Jurisdiction and § 153f of the German Criminal Procedure Code: a Commentary on the Decisions of the Federal Prosecutor General and the Stuttgart higher regional court in the Abu Ghraib/Rumsfeld case', (2007) 18 Criminal Law Forum 43, 44. See also Máximo Langer, (n 71), 11-15.

[378] Mari Takeuchi, (n 251), 142.

[379] Audiencia Nacional (Spanish National Court of Justice) Madrid, Preliminary Report no.: 157/2.008-G.A. 29 January 2009. Unofficial translation of a court order issued by the judge Fernando Andreu provided by FIDH is available at http://www.fidh.org/IMG/pdf/admission_order_propery_translated-1.pdf.

[380] Ibid.

indicate that the Israeli judiciary was investigating allegations of a war crimes.[381] Israel challenged the court's decision, claiming that the Israeli judiciary exercised its jurisdiction and supported its claim with evidence indicating that the Israeli judiciary was conducting an independent and impartial investigation into allegations of war crimes committed in Gaza in 2002.[382] Based on the evidence provided by the Israeli side, the National Criminal Court of Appeals (Sala de lo Penal de la Audiencia Nacional) on 30 June 2009 found that the Israeli judiciary was conducting an independent and impartial investigation into the allegations of war crimes. Hence, it was decided that the Spanish judiciary could not exercise UJ because Israel had exercised its territorial jurisdiction.[383]

In light of the above examples, it can be observed that the exercising of UJ is permitted only if States with traditional criminal jurisdiction do not want, or are unable, to exercise their criminal jurisdiction. Here the question arises: what are the legal criteria that determine when states with a traditional jurisdiction are unable or unwilling to exercise their criminal jurisdiction? This issue was critically discussed in two PhD theses, one of them was in 2014 at the University of Glasgow and the other was in 2015 at the University of Czech Republic.[384] In this regard, it was argued that the legal standard for determining the principle of complementarity provided under article 17 of the Rome Statute could be used as guideline for exercising UJ in a subsidiary manner. This point of view is also supported by the fact that in order to exercise UJ in a subsidiary manner, UJ should not be exercised unless the State with traditional jurisdiction is unable or unwilling to prosecute. In this matter, the legal standards to determine the inability and unwillingness of a State to prosecute are laid out in article 17 paragraph 2 and 3.[385] These standards

[381] The Audiencia Nacional de Madrid, Preliminary Proceedings, No.157/2.008, 4 May 2009.

[382] See Israel Ministry of Foreign Affairs, Gaza Operation Investigations: An Update, issued on 29 Jan 2010, available at https://mfa.gov.il/MFA/ForeignPolicy/Terrorism/Pages/Gaza_Operation_Investigations_Update_Jan_2010.aspx [accessed 15 May 2020]

[383] Ibid, unofficial translation of Decision no. 1/2009, 17 July 2009 (plenary), of the National Criminal Court of Appeals ("Sala de lo Penal de la Audiencia Nacional"), at 24, regarding Preliminary Criminal Proceedings no. 154/2008 of the Central Investigation Court no. 4. See also David Hughes, 'Investigation as Legitimisation: The Development, Use and Misuse of Informal Complementarity', (2018) 19 Melbourne Journal of International Law 84, 116.

[384] Mari Takeuchi, (n 251), 142. See also Petra Baumruk, (n 112), 122.

[385] Rome Statute, (n 19), art 17 (2), (3).

have been discussed in detail. Hence, national courts could use these legal criteria to determine the inability or unwillingness of a State to exercise UJ in a subsidiary manner.

In light of the above analysis, it can be concluded that most States have confirmed that UJ should be exercised in a subsidiary manner, which means that UJ should not be exercised unless the State with traditional jurisdiction is unable or unwilling to prosecute. It was argued that the practice of UJ will be enhanced by giving priority to criminal jurisdiction based on traditional grounds, such as territorial jurisdiction and national jurisdiction.[386] In recent years, subsidiarity has been supported as a guiding principle in the exercise of UJ, which aims to bring balance between principles of UJ and state sovereignty.[387]

4.4: The Difficulties Faced by National Courts' Implementation

Following the description of the legal position of State practice of UJ at the beginning of this chapter, this section highlights the most important problems that have been encountered by States in the implementation of UJ. These difficulties have impeded or prevented completely some States from exercising UJ, and some States have narrowed the scope of the practice of UJ because of these difficulties. Accordingly, this section discusses the legal issues from which these difficulties arose, such as the lack of national legislation and its impact on the exercise of UJ, as well as possible solutions.

4.4.1: Lack of National Legislation and Criminal Procedure

The absence of national legislation is an obstacle to the exercising of UJ. Indeed, most national courts do not practice criminal jurisdiction unless there is a provision in their procedural law authorising them to do so.[388] Criminal jurisdiction is the authority of the judiciary to prosecute the accused for the crimes they have committed, but the subject of this jurisdiction are

[386] Petra Baumruk, (n 112), 122.
[387] Mari Takeuchi, (n 251), 128.
[388] Mahmoud Cherif Bassiouni, (n 24), 82

actions criminalised by law.[389] As mentioned in chapter three, there are five grounds of criminal jurisdiction, one of which is UJ.[390]

In this matter, it was argued that "[i]n many legal systems, the national judiciary cannot apply universal jurisdiction in the absence of national legislation."[391] Additionally, it was claimed that the lack of national legislation is an obstacle to the exercise of UJ due to the fact that UJ is a procedural principle that does not usually envisage applicability without the existence of substantive provisions in the Penal Code relating to crimes that are the subject of such jurisdiction.[392] The issue of a lack of national legislation in regard to UJ can take two forms: firstly, a lack of national criminalisation of acts that are subject to UJ. Secondly, a lack of national legislation providing UJ as a legal procedure for prosecuting the perpetrators of such acts.

In this regard, the principle of legality might be invoked to justify the non-exercise of UJ. The principle of legality (*nullum crimen, nulla poena sine lege*) means that there can be no crimes and punishments without law.[393] Thus, there shall be no crime or penalty except in accordance with a written law that provides for the clear provision of the offence and its punishment.[394] It is clear that the application of the national criminal law is always governed by the principle of the legality of the criminal act and its penalty.[395]

Regarding UJ, the principle of legality might not be strictly applicable, particularly when it comes to international crimes since international crimes that are subject to UJ have been prohibited in international conventions. Furthermore, such crimes constitute a violation of *jus cogens*.[396] Accordingly, if the accused is present in territory of a State, that state cannot invoke the absence of the traditional link of jurisdiction to prosecute.[397] As States in such a

[389] Harvard Research in International Law, Draft Convention on Jurisdiction with Respect to Crime, (1935) 29 The American Journal of International Law, art 1(b), 439.
[390] Anthony J. Colangelo, (n 110), 150.
[391] The Princeton Principles on Universal Jurisdiction, (n 107), Commentary, p 40.
[392] Rephael Ben-Ari, (n 17), 169-170.
[393] Mahmoud Cherif Bassiouni, (n 24), 99.
[394] Dalila Hoover, (n 6), 88.
[395] Ibid.
[396] The Princeton Principles on Universal Jurisdiction, (n 107), Article 2. See also Mahmoud Cherif Bassiouni, (n 24), 105. these crimes involve piracy, slavery, war crimes, genocide, crimes against humanity and torture.
[397] Xavier Philippe, (n 272), 385.

scenario are obligated to exercise UJ, so the exercise of UJ must always be regulated by their national laws.[398]

However, the above-mentioned argument cannot fully solve the issue of a lack of national criminalization as an obstacle to the exercising of UJ as some states do not in fact address all international crimes under their national law, or the definition of crimes does not satisfy international requirements.[399] On the other hand, the provisions of international convention cannot be applied directly to national criminal trials because most international conventions do not include clear criminal provisions. For example, they do not specify the penalties for perpetrators of these prohibited acts. The four Geneva convention provide that "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention".[400]

According to the above-mentioned article, the four Geneva Conventions do not address the penalties for war crimes, but rather they demand states adopt the necessary legislation for criminalising war crimes and punishing the perpetrators of these crimes. Accordingly, states should adopt sufficient legislation as well as the necessary legislation to permit the exercising of UJ; the lack of which could be an obstacle to exercising of UJ.[401] In this regard, the case of *Javor et autres* before the French judiciary could be used as an example.[402] Elvir Javor and other Bosnian citizens who reside in France, filed a complaint before the French judiciary on 20 July 1993 for war crimes and crimes against humanity that were committed against them in former Yugoslavia in 1992. In this matter, it was argued that the French judiciary was bound by the provisions of the four Geneva Conventions of 1949, which France had ratified in 1951.[403] However, on 6 May 1994, the French judiciary declined jurisdiction on the basis of that "French courts have held that the Conventions were not directly applicable in national law. Accordingly, grave breaches or war crimes are not subject to universal jurisdiction under

[398] Amnesty International, (n 3), 7.
[399] Ibid, 2.
[400] See Articles (49-50-129- 146), respectively, are contained in the four Geneva Conventions of 1949.
[401] Bruce Broomhall, (n 66), 399-400.
[402] Case of Javor et autres, (n 145).
[403] See International Committee of The Red Cross, Treaties, States Parties and Commentaries, available at https://ihldatabases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=380

French law."[404] In this matter, it was claimed that there was no provision under French law permitting UJ over violations of the four Geneva Conventions of 1949.[405] Furthermore, it was argued French legislator did not adopt explicit provisions that criminalize war crimes and set penalties for perpetrators of such an act. Accordingly, it was concluded that French courts could not apply the provisions of the four Geneva Convention directly because it did not address the penalties for war crimes.[406] This case was only accepted later by the French judiciary after 2nd of January 1995, when law was adopted into French legislation to prosecute perpetrators of crimes in the former Yugoslavia in conformity with Security Council resolution 827.[407] In light of the above-mentioned, it can be noticed that UJ was not exercised until the French legislator adopted a law authorizing such jurisdiction. Accordingly, it is clear that the lack of national legislation providing UJ is considered as an obstacle for exercising such jurisdiction.

As another example, it was mentioned that war crimes were not covered by UJ under national legislation in Venezuela.[408] This issue was raised when a criminal proceeding was initiated that requested the Venezuelan judiciary to exercise UJ over war crimes allegedly committed in Colombia by members of (ELN)[409] and (FARC).[410] In this matter, the prosecutor concluded that UJ could be exercised because there of a lack of internal legislation in Venezuela allowing the exercise of UJ over war crimes.[411] Accordingly, it can argued that the lack of national legislation is an obstacle to the exercise of UJ.[412]

It is worth mentioning that the issue of lack of national legislation will be more complicated for countries that have adopted the dualism theory of international law. This theory provides that the provisions of international law and domestic law are independent from each other.[413] Hence, many states require that the provisions of international law should be translated into

[404] Human Rights Watch, (n 221).
[405] Case of Javor et autres, (n 145).
[406] Ibid.
[407] The Court of Cassation,Criminal Chamber, on 26 March 1996; Dupaquier et al., Order of Tribunal de grande instance de Paris, 23 February 1995.
[408] Amnesty International, (n 53), 27.
[409] (Ejército de Liberación Nacional) The National Liberation Army Colombia
[410] (Fuerzas Armadas Revolucionarias de Colombia) The Revolutionary Armed Forces of Colombia
[411] Decisión de la Fiscalia Sexta del Ministerio Publico a Nivel Nacional con competencia Plena a cargo de Maria Alejandra Perez G., C-115-2008, 07 February 2008. Translated to English by Amnesty International, (n 53), 27.
[412] Amnesty International, (n 53), 7.
[413] Olympia Bekou, (n 116), 242.

domestic laws to be applied by national courts.[414] Consequently, the national judges of these states cannot apply the provisions of international law unless states enact domestic law that explicitly incorporates the provisions of international treaties.[415] In this matter, the Colombian Constitutional Court, as noted above, claimed that although there are international provisions permitting the exercising of UJ, Colombian courts cannot exercise this jurisdiction unless it is expressly provided under Colombian law.[416] Consequently, UJ cannot be exercised in Colombia because Colombian national law does not explicitly allow UJ.[417]

It general, it can be concluded that the lack of national legislation is an obstacle to the exercise of UJ. Accordingly, there is a need to criminalise the acts that are subject to UJ under national legislation. In other words, States should always adopt sufficient legislation to criminalise and punish the most serious international crimes. Additionally, States should adopt the necessary legislation to permit the exercise of UJ over such crimes.[418] Exercising UJ at domestic level requires the adoption of the necessary legislation for defining the crimes that are subject to it.[419]

4.4.2: Sovereign Equality

The principle of sovereignty is often used as a pretext for refusing the exercising of UJ over international crimes.[420] Many states refuse the use of criminal jurisdiction by foreign or international courts over crimes committed on their territory or by their nationals residing in that territory.[421] This is due to the fact that they consider such a scenario a violation of their national sovereignty and the principle of sovereign equality.[422] In fact, the principle of

[414] Ibid.
[415] David Feldman, (n 118), 105.
[416] Constitutional Court Colombia, (n 123). See also Observations by Permanent Mission of Colombia to the UN, (n 115).
[417] Ibid. See also Julio Rios-Figueroa*, Constitutional Courts as Mediators: Armed Conflict, Civil-Military Relations, and the Rule of Law in Latin America*, (1st edn, Cambridge University Press, 2016) 78.
[418] Amnesty International, (n 3), 7.
[419] Terje Einarsen, *The Concept of Universal Crimes in International Law*, (1st edn Oslo Torkel Opsahl Academic EPublisher 2012) 114.
[420] Rahim Hesenov, (n 83), 279.
[421] Gabriel Bottini, (n 327), 556.
[422] Anthony Sammons, 'The "Under-Theorization" of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts', (2003) 21 Berkeley Journal of International Law 111, 138. See also Melinda White, 'Note & Comment, Pinochet, Universal Jurisdiction and Impunity', (2000) 7 Southwestern Journal of Law and Trade in the Americas 209, 224.

sovereign equality is guaranteed by the Charter of the UN which stated that "the Organization is based on the principle of the sovereign equality of all its Members".[423] However, it was argued UJ has been misused and restricted to developing countries,[424] and that the practice of UJ is limited to crimes committed in developing countries or by their citizen.[425]

Although about thirty people were tried before national courts based on UJ between 1994-2003, none of these were citizens of western countries.[426] In this matter, it was argued that it is difficult to exercise UJ over crimes committed on the territory of the superpowers or by one of their citizens,[427] because they will use their influence and power to prevent the exercise of UJ over their citizens.[428] To demonstrate this, Belgium exercised UJ and issued arrest warrants against suspects in African countries such as Congo and Senegal.[429] By contrast, it was unable to do so over accused citizens of the United States, Israel and China because these countries used their power and influence to prevent the exercising of such jurisdiction over their citizen.[430] For instance, the US has threatened that NATO headquarters will be transferred to another country if Belgium continues to exercise UJ against US officials.[431] As a result, Belgium amended its law and limited the exercise of UJ by the Act of 2003.[432]

Consequently, the issue of double standards and violation of the principle of sovereign equality will be raised.[433] The reasons behind this issue is that firstly, although all states are equally sovereign in legal terms, in practice they are different and this difference depends on their power and political influence.[434] Secondly, the exercise of UJ in an absolute manner,

[423] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, art 2 (1).
[424] Gabriel Bottini, (n 327),556-559.
[425] Ibid.
[426] Ibid. See also Petra Baumruk, (n 112), 160.
[427] Manisuli Ssenyonjo, 'The Rise of the African Union Opposition to the International Criminal Court's Investigations and Prosecutions of African Leaders', (2013) 13 International Criminal Law Review 385, 425.
[428] Olympia Bekou and Robert Cryer, (n 8), 56.
[429] Arrest Warrant Case, (n 328), p 70. See also Human Rights Watch, The Case of Hissène Habré before the Extraordinary African Chambers in Senegal: Questions and Answers, 27 April 2015, available at http://www.refworld.org/docid/554088204.html [accessed 26 July 2020]
[430] Jana Panakova, (n 7), 58.
[431] Luc Reydams, 'Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law', (2003) 1 Journal of International Criminal Justice 679, 685.
[432] Ibid, 682.
[433] Bernhard Graefrath, 'Universal Criminal Jurisdiction and an International Criminal Court', (1990) 1 European Journal of International Law 67, 72-73. See also Olympia Bekou and Robert Cryer, (n 8), 56.
[434] Colin Warbrick and Vaughan Lowe, (n 178), 211.

without respecting the legal preconditions, will lead to misuse of UJ. For instance, neglecting the presence of the accused in the territory of the State as a condition for the exercise of UJ will make UJ a loose jurisdiction that might be selectively misused against certain States. Additionally, neglecting the use of UJ in a subsidiary manner could violate the principle of state sovereignty. As mentioned above, UJ should be implemented in a subsidiary manner,[435] which means that UJ will be exercised only if the State in which the crimes are committed or the State in which the accused are national is unwilling or unable to prosecute the accused.[436] Accordingly, failure to respect the preconditions of UJ may result in a violation of the sovereignty of States and their right of priority to prosecute crimes committed in their territory or by one of their nationals. Thirdly, the principle of UJ over international crimes is still developing and there are no clear international texts regulating its exercise.[437] That is the reason that has pushed a significant number of States to recently demand the United Nations to determine the definition and scope of UJ to avoid misuse.[438]

In light of the above, viewing UJ as an enemy of the principle of national sovereignty is exaggerated for the following reasons: firstly, the crimes covered by UJ not only concern the State where the crimes were committed, they concern the international community as a whole.[439] Accordingly, the national courts, if they exercise UJ over these crimes, will exercise it on behalf of the international community.[440] Secondly, the exercise of UJ should be conditional on the presence of the accused in the territory of the State that will exercise UJ.[441] This is because there is no legal basis that supports the legality of UJ in absentia.[442] As mentioned above, it was argued that the exercise of UJ in absentia is unknown in international law.[443] Therefore, neglecting the need for the presence of the accused in the territory of the State as a condition for UJ will make it a loose jurisdiction that can be selectively misused

[435] ZHU Lijiang, (n 148) 217.
[436] Report of the UN Secretary-General, (n 23), para 155.see also Luc Reydams, (n 368), 7.
[437] Mahmoud Cherif Bassiouni, (n 24), 82
[438] Report of the Sixth Committee, 64th session on "the scope and application of the principle of universal jurisdiction", UN. Doc. No. A/62/425 (16 December 2009); UNGA Resolution, 64th Session, Agenda 84, Resolution adopted by the General Assembly on 16 December 2009 [on the report of the Sixth Committee (A/64/452)], No. A/RES/64/117, (15 January 2010).
[439] Anthony J. Colangelo, (n 110), 162.
[440] Mahmoud Cherif Bassiouni, (n 24), 96-97.
[441] Rephael Ben-Ari, (n 17), 170.
[442] Fannie Lafontaine, (n 31), 1283.
[443] Separate Opinion of President Guillaume, (n 153).

against certain States. Thirdly, the exercising of UJ should be conditional on it being used as last resort, in addition the priority to employ criminal jurisdiction is granted to the State where the crimes were committed.[444] Consequently, the territorial state can maintain its sovereignty and prevent the use of UJ through the exercising of its criminal jurisdiction.[445] It is worth mention that the exercise of UJ is conditional on the principle of double jeopardy, "*Ne bis in idem*".[446] Therefore, if the territorial state begins to prosecute the accused or effectively they were prosecuted, the exercise of UJ by any other state will be avoided.[447]

In light of the above analysis, it can be concluded that the principle of sovereignty per se cannot be considered an obstacle to the exercise of UJ. However, the principle of sovereign equality could be vulnerable to violation if UJ is exercised in an absolute manner without respecting legal preconditions. Accordingly, it can be argued that the legal preconditions of UJ should be taken into account, particularly, the issue of exercising UJ as a last resort.[448] In other words, UJ should be exercised only if the State is unwilling or unable to exercise their criminal jurisdiction.[449]

4.4.3: Potential and Actual Political Abuses

One of the main obstacles to the use of UJ is political pressure from powerful countries.[450] The reason for this is that States' compliance with the provisions of international law can depend on the compatibility of their interests with the law, as Louis Henkin noted.[451] The political pressures from powerful countries have always played a significant role in the development of international criminal law.[452] For example, the pressure exerted by the

[444] Jo Stigen, 'The Relationship between the Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes', in Morten Bergsmo (ed), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes,* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 141.
[445] Ibid, 153-157.
[446] Cedric Ryngaert, 'Complementarity in Universality Cases: Legal-Systemic and Legal Policy Considerations', in Morten Bergsmo (ed), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 170-175.
[447] Mohamed M. El Zeidy, 'The Principle of Complementarity a New Machinery to Implement International Criminal Law', (2002) 23 Michigan Journal of International Law 869, 931-940.
[448] Petra Baumruk, (n 112), 127. See also Observations by Permanent Mission of Colombia to the UN, (n 115).
[449] Fannie Lafontaine, (n 31), 1286.
[450] Gabriel Bottini, (n 327), 559.
[451] Louis Henkin, *How Nations Behave*, (2d edn. New York: Columbia University Press for the Council on Foreign Relations, 1979) 49.
[452] Michael Scharf, (n 248), 71-73, 79-83.

United States against the proposal to grant the ICC absolute UJ over any crime committed in the world[453] was also rejected by Russia and China.[454] In this matter, international law is always formulated by a few powerful states to support their interests.[455] This issue will be discussed more critically in next chapter.

Accordingly, the political pressure of powerful countries have been classified as an obstacle to the exercise of UJ by national courts.[456] As mentioned, national courts have not tried any citizens of Western countries through the exercise of UJ.[457] The question that arises is whether political pressure from powerful countries has been an obstacle to the exercise of UJ.

In fact, political pressure has led to restrictions on the exercise of UJ in the UK as amendments were made in response to pressure from the Israeli government after an arrest warrant was issued against Israeli Foreign Minister Tzipi Livni.[458] In 2009, an arrest warrant was issued accusing her of war crimes war crimes in Gaza in 2009.[459] Consequently, a group of Israeli officials cancelled their visit to the UK in January 2010.[460] As a result, in 2011, the parliament set limits on the exercise of UJ to avoid any damage to the relationship between the UK and Israel.[461] In fact, the practice of UJ was already limited by the condition not to harm the public interests.[462] In this matter the British government announced that the amendment was made to prevent the use of British courts for political purposes detrimental to the interests of the state.[463] Accordingly, it is clear that the amendments of the UK parliament to the practice of

[453] Olympia Bekou and Robert Cryer, (n 8), 53-55.
[454] Nicolaos Strapatsas, (n 102), 16. See also Ademola Abass, (n 7), 371-372.
[455] Louis Henkin (n 451), 10.
[456] Bernhard Graefrath, (n 433), 72-73.
[457] Gabriel Bottini, (n 327), 556-559.
[458] FIDH and REDRESS, Universal Jurisdiction Trial Strategies: Focus on victims and witnesses, A report on the Conference held in Brussels, 9-11 November 2009, p 79, available at <https://www.fidh.org/IMG/pdf/Universal_Jurisdiction_Nov2010.pdf> [accessed 20 April 2019].
[459] REDRESS, FIDH, ECCHR and FIBGAR. Make Way for Justice #3: Universal Jurisdiction Annual Review 2017 #UJAR, p 63. Available at <https://trialinternational.org/wp-content/uploads/2017/03/UJAR-MEP_A4_012.pdf> [accessed 20 April 2019].
[460] FIDH and REDRESS, Extraterritorial Jurisdiction in The European Union, December 2010, 260. Available at <https://www.fidh.org/en/region/europe-central-asia/Extraterritorial-Jurisdiction-in> [accessed 20 April 2019].
[461] Wolfgang Kaleck, 'From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008', (2009) 30 Michigan Journal of International Law 927, 962.
[462] Ibid.
[463] Observations by Permanent Mission of the United Kingdom to the UN on the scope and application of the principle of universal jurisdiction, the 66th session, the Sixth Committee of UN, (2011), available at <http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/UK&Northern%20Ireland.pdf> [accessed 20 July 2020].

UJ came in order to protect the interests of the state, after political pressures prompted it to do so.

On the other hand, most of the analysis has been based on the amendment to Belgian law.[464] Here, there was political pressure exerted by the United States on Belgium after it opened an investigation against Former US President George W. Bush and his Defence Secretary Donald Rumsfeld.[465] The US threatened that the NATO headquarters would be transferred to another country if Belgium continued to exercise UJ against US officials.[466] As a result, Belgium amended its law of 1999,[467] which was characterized by its absolute flexibility in the exercise of UJ to the 2003 Act, which limits the exercise of UJ.[468] In this regard, it was noted that "[w]ith its universal jurisdiction law, Belgium helped destroy the wall of impunity behind which the world's tyrants had always hidden to shield themselves from justice […] It is regrettable that Belgium has now forgotten the victims to whom it gave a hope of justice."[469]

However, American political pressure was not the only factor in the modification of Belgian law. As noted previously, the exercise of UJ by Belgium was subject to a number of criticisms including allowing the exercise of UJ in absentia and non-respect for the diplomatic immunity.[470] In fact, the issue in the US case, was about exercising UJ over holders of diplomatic immunity since the accused were the US president and the defence minister who would visit Belgium officially as the host country of the NATO alliance.[471] In this matter, the ICJ had ruled before in the Congo case v Belgium that Belgium should respect the principle of diplomatic immunity because the exercise of UJ by national courts should not violate the principle of diplomatic immunity.[472] The main difference between the two cases is that Congo chose the ICJ as the legal means to adjudicate the issue of the dispute between it and

[464] Jana Panakova, (n 7), 58.
[465] Olympia Bekou and Robert Cryer, (n 8), 56.
[466] Luc Reydams, (n 431), 685.
[467] Ibid, 682.
[468] Jana Panakova, (n 7), 61. See also Antonio Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction', (2003)1 Journal of International Criminal Justice 589, 592.
[469] Human Rights Watch, Belgium: Universal Jurisdiction Law Repealed, 01 August 2003, available at <https://www.hrw.org/news/2003/08/01/belgium-universal-jurisdiction-law-repealed> [accessed 26 May 2018].
[470] Roger O'Keefe, (n 10), 811-812
[471] Jana Panakova, (n 7), 57-60.
[472] Arrest Warrant Case, (n 328), p 70.

Belgium,[473] while the United States chose to use its power and influence to limit the exercise of UJ over its officials.[474] Accordingly, it can be concluded that political pressure is one of the major factors that may prevent the exercise of UJ, however, it is not the only factor.

4.5: Summary

This chapter examined States' legal position on UJ in order to discuss the following three points: firstly, whether the exercise of UJ over the most serious crimes exists as rule of customary international law. Secondly, to determine the preconditions for UJ by examining State practice. Thirdly, to highlight the difficulties that have faced states when they practiced UJ in order to aid in any possible codification of UJ in future.

Accordingly, the chapter examined the validity of considering customary international law as a legal basis for UJ. The practice of 72 states across five continents with different legal systems was analysed. This revealed that 46 states have adopted UJ expressly under their national legislation. Nine out of the 72 states have adopted UJ implicitly under their national legislation, and seventeen out of the 72 states merely recognise the principle of UJ without any actual exercise in their legal system.

The following subsection discussed the existence of the two constituent elements of customary international law in the context of UJ. In this matter, it was suggested that the authorising of UJ by the national legislation of 46 states could be regarded as form of State practice.[475] This is due to the fact that the existence of general practice could be ascertained by ensuring that States have accepted and exercised a customary rule through one of their institutions, executive, legislative or judicial.[476] It is worth mentioning that, It is not required that the rule should be exercised by a certain number of States to be considered an international custom, but rather, that the such rule is used widely by States.[477] In this matter, the figure of 46 states suggests that practice is general and not limited to a few Stated from

[473]Ariel zemach, (n 331), 159.
[474] Gabriel Bottini, (n 327), 507.
[475] Draft conclusions on the identification of customary international law, (n 178), Conclusion 5, p 132.
[476] Draft Articles on Responsibility of States for internationally wrongful acts, (n 198), Art 4-5.
[477] Draft conclusions on the identification of customary international law, (n 178), Conclusion 8, commentary 3, p 136.

a specific region, but rather it is widely accepted by a significant number of states across different continents.

Based on the States' practice it was observed that UJ is not absolute. Rather, there are a number of conditions that must be met to exercise UJ. These preconditions include the follows: firstly, the presence of the accused in the territory of the states that will exercise the UJ. Secondly, the exercise of UJ should not violate the immunity of current high officials. Thirdly, the exercise of UJ should be a subsidiary to the criminal jurisdiction of other States.

Chapter Five: The principle of Universal Jurisdiction (UJ) in the Framework of International Criminal Law Organs

5.1: Introduction

The research in the previous chapter highlighted state practice of UJ, examined its legal framework and discussed its positive and negative aspects. The previous chapter shows that the exercise of UJ by national courts makes a significant contribution to the fight against impunity by acting as a deterrence to offenders and filling the gap of impunity in the absence of effective international jurisdiction. On the other hand, the previous chapter demonstrated that there are significant number of problems that are encountered by states in the implementation of UJ. These difficulties have impeded or prevented some states from exercising UJ, and some states have narrowed the scope of the practice because of these difficulties.

Accordingly, these difficulties have highlighted that there is need for international cooperation in order to exercise UJ uniformly. Therefore, this chapter will discuss the reasons for the failure of international efforts to grant UJ to any international tribunal. It will examine the possibility of exercising UJ by national courts with the support of an existing international institution, such as the International Criminal Court (ICC). In order to examine the above issues, the research firstly will highlight a brief history of the international efforts to grant UJ to an international tribunal. Secondly, it will discuss the nature of the international jurisdiction of international tribunals in order to demonstrate the difference between them and UJ. Thirdly, the chapter will examine the nature of the ICC's jurisdiction and discuss the main points of this jurisdiction during the drafting of the Rome Statute with the aim of demonstrating the difference between UJ and the international jurisdiction of the ICC. This will then help to clarify why the ICC's jurisdiction is not UJ.

The chapter then goes on to discuss the power given to the Security Council to refer any situation to the International Criminal Court. The purpose of this section is to discuss whether

the role of the Security Council in the establishment of international tribunals could be classified as a practice of UJ. In this regard, particular attention will be given to the legal requirement for making a referral to the ICC in order to find out whether the Security Council's referral policies are similar to UJ. The final issue that will be discussed in this chapter is whether conferring UJ to the ICC or a new international court would be beneficial. Here, it is argued that a single international criminal court is not able to prosecute the high number of accused who are alleged to have committed international crimes.[1] Consequently, national courts with the cooperation of regional or international institutions should be granted the right to apply UJ.

5.2: The Absence of UJ in the Framework of International Tribunals

5.2.1: A Brief History of the International Efforts to Grant UJ to International Tribunals

International efforts to establish a permanent international court, or as it has been called, the penal court of nations, date back to October 1925 at the Inter-parliamentary Union (IPU) Conference.[2] The need to create an international criminal court was formally recognised by the representatives of 41 nations . The court was assumed to be a chamber of the Permanent Court of International Justice (PCIJ), however, these efforts ultimately failed. In November 1937, slightly over a decade later, an international convention established an international penal court that was assumed to have an optional criminal jurisdiction over terrorism. However, because of the outbreak of World War II the convention did not enter into force, despite the signature of 13 states and ratification by India.[3]

UJ was not part of the jurisdiction of the court. This is perhaps because it was too early to consider the exercise of UJ by an international tribunal, as this was largely inspired by the

[1] Yearbook of the ILC 1996, vol. II (Part Two). Doc. No. A/CN 4/SER A/1996/Add1, at 28

[2] Vespasian Pella, 'Towards an International Criminal Court', (1950) 44 American Journal of International Law 37, 37-38. Convention for the Creation of an International Criminal Court. Opened for signature at Geneva, Nov. 16, 1937, League of Nations O.J. Spec. in Supp. No. 156 (1938), League of Nations Doc. C.547(I).M.384(I).1937V].

[3] Ibid, 38; M. Cherif Bassioun, 'The Time Has Come for an International Criminal Court', (1991) 1 Indiana International & Comparative Law Review 1, 4; Geoffrey Marston, 'Early Attempts to Suppress Terrorism: The Terrorism and International Criminal Court Conventions of 1937', (2002) 73 British Yearbook of International Law 293, 293-294.

events of World War II.[4] It was noted in the preceding chapters that UJ during this period was confined to the crimes of piracy and slavery.[5] In addition, international recognition of the exercise of UJ by national courts over war crimes and other international crimes occurred after World War II.[6] It is therefore difficult to talk about the exercise of UJ by an international tribunal before the second World War.[7]

Following the end of World War II, the international community established the Nuremberg and Tokyo International Tribunals to try war criminals.[8] However, the jurisdiction of the above tribunals was not UJ because it was limited to Second World War criminals.[9] The tribunals' jurisdiction is known as international criminal jurisdiction.[10] The difference between the international jurisdiction of the Tribunals and UJ will be elaborated on later in this section.

Also following the second World War the United Nations (UN) was established in 1945 on the ruins of the League of Nations.[11] The issue of establishing an international criminal court continued to be discussed at the UN. On the 9th December 1948, the UN General Assembly issued a resolution that stressed the need to establish a judicial organ to prosecute certain international crimes.[12] Accordingly, the International Law Commission (ILC) was requested to

[4] Robert Cryer, *Prosecuting International Crimes Selectivity and the International Criminal Law Regime*, (1st edn, Cambridge University Press 2005) 30-36.

[5] Mahmoud Cherif Bassiouni, 'Universal jurisdiction for international crimes: historical perspectives and contemporary practice', (2001) 42 Virginia Journal of International Law 81, 108. See also Yana Shy Kraytman, 'Universal Jurisdiction – Historical Roots and Modern Implications', (2005) 2 Brussels Journal of International Studies 94, 115.

[6] International Law Association, Final Report on the Exercise of Universal Jurisdiction In Respect of Gross Human Rights Offences, prepared by the Committee on International Human Rights Law and Practice, submitted to (London Conference, 2000), p3. [hereinafter Report of the ILA]. See also Yearbook of the ILC 1996, (n 1), 28**. See also** Robert Cryer, (n 4), 30-36.

[7] Michael Scharf, 'The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position', (2001) 64 Law and Contemporary Problems 67, 82.

[8] Máximo Langer, 'The diplomacy of universal jurisdiction: the political branches and the transnational prosecution of international crimes', (2011) 105 The American Journal of International Law 1, 3. See also Mahmoud Cherif Bassiouni, (n 5), 91. See also Robert Cryer, *An Introduction to International Criminal Law and Procedure*, (2nd edn. Cambridge University Press, 2010) 109.

[9] See Nuremberg Charter, (Charter of the International Military Tribunal) (1945), The London Agreement of 8 August 1945, art 7. See also Tokyo Charter, International Military Tribunal for the Far East Charter (IMTFE Charter) Special proclamation by the Supreme Commander for the Allied Powers at Tokyo January 19, 1946; Treaties and Other International Acts Series N. 1589, art 6.

[10] Report of the UN Secretary-General, The Scope and Application of the Principle of Universal Jurisdiction, Sixty-fifth session, UN. Doc. No A/65/181 (29 July 2010), para23, p8.

[11] The United Nations was founded on 24 October 1945, San Francisco, California, United States. See History of the United Nations, at the United Nation official website. Available at <http://www.un.org/en/sections/history/history-united-nations/> (Accessed on 30/11/2018)

[12] UNGA Resolution 260, Prevention and punishment of the crime of genocide, 9 December 1948, UN Doc. A/RES/260, p 177.

examine the possibility of establishing an international criminal court as a Chamber of the International Court of Justice (ICJ).[13] The establishment of an international criminal court as a Chamber of the ICJ meant that the jurisdiction would not be UJ, but would be optional jurisdiction in accordance with the jurisdiction of the ICJ.

By analysing the UN General Assembly resolution, it can be observed that it was closely linked to the debate that took place during the drafting the Genocide Convention, which was adopted on the same day.[14] The resolution states:

> The General Assembly,
>
> Considering that the discussion of the Convention on the Prevention and Punishment of the Crime of Genocide has raised the question of the desirability and possibility of having persons charged with genocide tried by a competent international tribunal,
>
> Considering that, in the course of development of the international community, there will be an increasing need of an international judicial organ for the trial of certain crimes under international law,
>
> Invites the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions;
>
> Requests the International Law Commission, in carrying out this task, to pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice.[15]

Bernhard Graefrath notes that the issue of exercising UJ by an international criminal tribunal or national court was discussed during the drafting of the Genocide Convention. However, a significant number of states supposed that the exercise of jurisdiction by an international tribunal would not be possible because they thought it unrealistic, rather than undesirable.[16] Therefore, they voted against such jurisdiction by an international tribunal.[17] In this regard, the report of the Sixth Committee notes that "[a]t its 98th meeting the Committee, by 23 votes to 19, with 3 abstentions, decided to delete the reference in the text to trial before an

[13] Vespasian Pella, (n 2), 37.
[14] UNGA Resolution 260, (n 12).
[15] Ibid.
[16] Bernhard Graefrath, 'Universal Criminal Jurisdiction and an International Criminal Court', (1990) 1 European Journal of International Law 67, 69.
[17] Ibid.

international tribunal".[18] As a consequence of the above-mentioned discussion, the General Assembly resolution was not extended to include the issue of exercising UJ by an international tribunal. Rather, it was limited to a request from the ILC to examine the possibility of establishing an international court as a Chamber of the ICJ.[19] The issue of the establishment of an international criminal court as a Chamber of the ICJ did not gain much momentum. In addition, the establishment of an international criminal court and the exercise of UJ through an international criminal court were not discussed again for almost four decades.[20]

Here, it is worth distinguishing between the discussions on the establishment of an International Criminal Tribunal and the exercise of UJ by the international Criminal Tribunal. As mentioned, discussions on the establishment of an international Criminal tribunal were not always linked to the exercise of UJ. In fact, the establishment of an international tribunal was often discussed as a Chamber of the PCIJ or the ICJ.[21] In addition, it was discussed that the jurisdiction of the International Criminal Tribunal would be optional. The issue of exercising UJ through an International Criminal Tribunal was debated at the discussion of the Genocide Convention but this proposal was rejected because a significant number of states believed that the exercise of UJ by international criminal tribunal was not possible.[22]

After a hiatus for almost four decades, the question of exercising UJ by international criminal courts or national courts was discussed by the ILC during preparing a preliminary version of the Draft Code of Crimes against the Peace and Security of Mankind (DCCAPSM).[23] In 1988, the principle of UJ by national courts was adopted by the ILC to be a basis for this Code.[24] The 1996 Draft Code Article 8 provided that "[w]ithout prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17, 18, 19 and 20, irrespective of where or by whom those crimes were committed".[25] These crimes include, respectively,

[18] Report of the Sixth Committee, Third session, 1948, Genocide: Draft Convention and Report of The Economic and Social Council, Rapporteur: Mr. J. Spyropoulos, U.N. Doc A/760, 3 December 1948. P 5. Available at <http://undocs.org/A/760> (accessed 23/11/2018).
[19] UNGA Resolution 260, (n 12).
[20] Vespasian Pella, (n 2), 37.
[21] Ibid, 37-38.
[22] Bernhard Graefrath, (n 16), 69.
[23] Yearbook of the ILC 1996, (n 1), 27. See also Yearbook of the ILC 1988, Volume I, UN Doc A/CN.4/SER.A/1988 para 15.
[24] Bernhard Graefrath, (n 16), 72.
[25] Yearbook of the ILC 1996, (n 1), Art 8, p27.

genocide, crimes against humanity, crimes against UN personnel and associated personnel, and war crimes.[26]

In this matter, the ILC claimed that the concept of UJ should be applied by national courts.[27] This is because it would be impossible for an international criminal court alone to try and punish the huge number of offenders who have allegedly committed international crimes,[28] not only because the number of crimes that have been committed, but also because these kinds of crimes are usually committed as part of a general policy that involves a large number of participants.[29] It is worth mentioning that some members of the ILC expressed their fears about the disarray that would result from implementing UJ in national courts over crimes against peace and security of mankind.[30] Therefore, the ILC recommended that a combined approach to jurisdiction based on the jurisdiction of an international criminal court together with the implementation of UJ by national courts is required for the effective implementation of the Code of Offences against the Peace and Security of Mankind.[31] However, not much attention was given to discussing the establishment of an international criminal court at this time.

The subject resurfaced in 1989 when Trinidad and Tobago requested the UN to address the possibility of creating an International Criminal Court.[32] Consequently, this issue was revived at the UNGA, which requested the ILC to discuss the creation of an international criminal court.[33] Accordingly, in 1994 a draft statute for an international criminal court was completed by the ILC.[34] However, in the draft statute in 1994, the ILC did not address the issue of exercising UJ by the international criminal court. In this matter, Article 21 on jurisdiction did not mention allowing the exercise of UJ either directly or indirectly. In addition, Article 22 (4)

[26] Ibid, Art 17,18,19 and 20, p 44-54.
[27] Ibid, p28.
[28] Kevin Jon Heller, 'What Is an International Crime? (A Revisionist History)', (2017) 58 Harvard International Law Journal 353.
[29] Yearbook of the ILC 1996, (n 1), 28.
[30] Yearbook of the ILC 1983, Volume I, Doc. No. A/CN.4/SER.A/1983 para. 22; Yearbook of the ILC 1986, Volume I, Doc. No. A/CN.4/SER.A/1986 153, para. 32.See also Bernhard Graefrath, (n 16), 78.
[31] Bernhard Graefrath, (n 16), 72. See also Yearbook of the ILC 1996, (n 1), 28.-30
[32] Mahnoush Arsanjani, 'The Rome Statute of the International Criminal Court', (1999) 93 American Journal of International Law 22, 22-23.
[33] Ibid.
[34] International Law Commission, Draft Statute for an International Criminal Court with commentaries, 22 July 1994, art 21, in Yearbook of the ILC 1994, vol. II, (Part Two) forty-sixth session, Doc. No. A/CN.4/SER.A/1994/Add.l (Part 2), [hereinafter, Draft Statute for ICC].

provided that "If under article 21 the acceptance of a State which is not a party to this Statute is required, that State may, by declaration lodged with the Registrar, consent to the Court exercising jurisdiction with respect to the crime".[35] In fact, Article 22 (4) stressed that for the court to exercise its criminal jurisdiction there is a need for states' consent. Accordingly, the ILC did not propose the exercise of UJ for the court in the draft statute of 1994.

However, a few years later at the Rome Conference on the Establishment of an International Criminal Court, the issue of exercising UJ was raised again. Both Germany and South Korea proposed granting the court UJ.[36] However, the proposals were rejected, and the court was established in 1998 without having UJ.[37] This issue will be discussed further in the following sections.

Prior to the establishment of the Permanent International Criminal Court, the international community had witnessed the establishment of the International Criminal Tribunals for Yugoslavia (1993) and Rwanda (1994). However, the jurisdiction of these tribunals was not UJ because it was limited to the crimes that were committed in Rwanda and the former Yugoslavia.[38] In fact, their jurisdiction like the jurisdiction of the Nuremberg and Tokyo International Tribunals was international criminal jurisdiction.[39]

In general, it can be concluded that the international efforts to establish an international criminal court began in the early of 20th century in 1920 through the League of Nations.[40] These efforts continued after the World War II and with the creation of the United Nations in 1945.[41] However, these efforts were unsuccessful and were suspended in the 1950s for four decades. Despite this hiatus, the international efforts to establish an international criminal

[35] Ibid, art 22.
[36] Nicolaos Strapatsas, 'Universal jurisdiction and the International Criminal Court', (2002) 29 Manitoba Law Journal 1, 16. See also Olympia Bekou and Robert Cryer, 'The International Criminal Court and Universal Jurisdiction: A Close Encounter?', (2007) 56 International and Comparative Law Quarterly 49, 53-55.
[37] Ademola Abass, 'The International Criminal Court and Universal Jurisdiction', (2006) 6 International Criminal Law Review 349, 371-372.
[38] Statute for the (ICTY) International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. S/RES/827 (1993) (amended 1998), reprinted in 32 I.L.M. 1192 (1993), [hereinafter ICTY Statute]. See also Statute for the (ICTR) International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1598 (1994), [hereinafter ICTR Statute].
[39] Report of the UN Secretary-General, (n 10), para23. p8.
[40] Vespasian Pella, (n 2), 37-38.
[41] Ibid. See also UNGA Resolution 260, (n 12).

court resumed in the late 1980s.[42] These efforts established a permanent international criminal court in 1998.[43]

Throughout this long development it can be noticed that UJ as a jurisdiction of the International Criminal Court was discussed only in the following situations: firstly, during the discussion of the Genocide Convention,[44] where a significant number of states voted against such jurisdiction by an international tribunal.[45] Secondly, during the discussion of the DCCAPSM, where the ILC addressed the issue of exercising UJ by international criminal courts or national courts.[46] Here, they adopted UJ by national court should as the basis for the Code.[47] However, they argued that granting UJ to an international tribunal would not be an effective mechanism to combat offences.[48] Thirdly, at the Rome Conference on the Establishment of an International Criminal Court, the issue of exercising UJ through an international court was proposed by Germany and South Korea.[49] However, the proposals were rejected, and the ICC was established in 1998 without having UJ.[50]

5.2.2: The Distinction between UJ and International Criminal Jurisdiction

This section will discuss the difference between UJ and international criminal jurisdiction. As mentioned in Chapter Three, the term "UJ" is used for the jurisdiction exercised by the national courts of states for international crimes, regardless of where the crime was committed, and the nationality of the perpetrator or victims.[51] Inadvertently or intentionally, the term of "universal" not the term “international” is used to describe this jurisdiction, in order to distinguish it from the international criminal jurisdiction exercised by international tribunals.[52]

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[42] Mahnoush Arsanjani, (n 32), 22.
[43] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (amended 2010), [hereinafter Rome Statute]
[44] UNGA Resolution 260, (n 12).
[45] Report of the Sixth Committee, (n 18). See also Bernhard Graefrath, (n 16), 69.
[46] Yearbook of the ILC 1996, (n 1), 27. See also Yearbook of the ILC 1988, (n 23) para 15.
[47] Bernhard Graefrath, (n 16), 72.
[48] Ibid, 78. See also Yearbook of the ILC 1983, (n 30), para. 22; Yearbook of the ILC 1986, (n 30), para. 32.
[49] Nicolaos Strapatsas, (n 36), 16. See also Olympia Bekou and Robert Cryer, (n 36), 53-55.
[50] Ademola Abass, (n 37), 371-372.
[51] Anthony J. Colangelo, ‘Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law’, (2007) 48 Harvard International Law Journal 121, 130.
[52] Eugene Kontorovich, ‘The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation’, (2004) 45 Harvard International Law Journal 183, 184.

By contrast, the jurisdiction that is exercised by international criminal tribunals is called international criminal jurisdiction. The jurisdiction of the international criminal tribunals for Nuremberg, Tokyo, Yugoslavia and Rwanda are examples for international criminal jurisdiction.

International criminal jurisdiction was defined by Gabriel Bottini as follows: "International jurisdiction is exercised by an international body to which states have expressly agreed to delegate the power to enforce certain parts of international criminal law".[53] So, international criminal jurisdiction should not be confused with UJ, since the concept of UJ is exercised by national courts of any state when the legal conditions are met.[54] It is worth mentioning that there is no legal condition that requires that UJ should be limited to exercise by national courts only. However, there are no examples of the practice of UJ by an international tribunal. The Report of the Secretary-General of the UN noted that "universal jurisdiction may be exercised not only by States but also by international criminal tribunals and other criminal justice bodies".[55]

The most important feature of UJ is that it is not limited to being exercised over international crimes committed in a specific country or by citizens of those countries, but rather, it can be exercised over international crimes committed in any country of the world or by citizens of these countries.[56] By contrast, international criminal jurisdiction, in practice to date, is exercised by international tribunals established by international instruments exclusively for crimes committed in the territories of certain states or by their citizens.[57] For instance, Article 6 of the Nuremberg charter provided that the Nuremberg Tribunal's jurisdiction was limited to only the major war offenders of the European Axis states or anyone who acted for the interests of the European Axis states by committing the international crimes provided by the same article.[58] Furthermore, Article 1 of the ICTY Statute limited the Tribunal's jurisdiction over crimes committed in the territory of Yugoslavia since 1991.[59] Additionally, Article 1 of

[53] Gabriel Bottini, 'Universal jurisdiction after the creation of the International Criminal Court', (2004) 36 New York University Journal of International Law and Politics 503, 513.
[54] Ibid, 513.
[55] Report of the UN Secretary-General, (n 10), para 25, p.8.
[56] Eugene Kontorovich, (n 52), 184.
[57] Gabriel Bottini, (n 53), 513-514.
[58] Nuremberg Charter, (n 9), Art6.
[59] ICTY Statute, (n 38), art 1.

the ICTR Statute limited the Tribunal's jurisdiction over the crimes committed between 1st January 1994 and 31st December 1994 in the territory of Rwanda and those violations committed by Rwandan citizens in the territory of neighbouring States.[60]

It is worth mentioning that some writers have argued that the principle of universality is the legal basis that international conventions have adopted to establish the international criminal jurisdiction of the international tribunals.[61] Ariel Lett argues that "the international criminal tribunal can exercise jurisdiction based upon the universality principle, and often times must establish its jurisdiction through universal jurisdiction and other abstract policies, it is still distinct from a nation asserting universal jurisdiction".[62] However, this can be refuted, because the impact of the crimes on the international community as whole is the legal basis for both jurisdictions.[63] As mentioned in the third chapter, international crimes are subject to UJ because of their nature, which has prompted the international community to criminalises them and recognise them as universal crimes.[64] In fact, the consequence of these crime was described by Harry Gould as "the gravamen of these crimes is that they have always consequences a violation against all mankind".[65] Therefore, the impact of the international crimes has led the international community to establish and exercise two criminal jurisdictions: UJ and international criminal jurisdiction. In other words, the principle of universality was not the legal basis for establishing the jurisdiction of the international criminal tribunals. Arguably, the international criminal jurisdiction, like UJ, is based on the impact of the crimes on the international community as whole.

It has been claimed that international criminal jurisdiction and UJ have been presented as being closely linked on several occasions and are considered by some writers to be theoretically matched.[66] In fact, international criminal jurisdiction shares the same aim of UJ, since both aim to fill the impunity gap for the perpetrators of the most serious international

[60] ICTR Statute, (n 38), art 1.
[61] Leila Nadya Sadat, 'Redefining Universal Jurisdiction', (2001) 35 New England Law Review 241, 246.
[62] Ariel Lett, 'The Meaningless Existence of Universal Jurisdiction', (2014) 23 Michigan State International Law Review 545, 560.
[63] Rephael Ben-Ari, 'Universal jurisdiction: chronicle of a death foretold?', (2015) 43 Denver Journal of International Law and Policy 165, 169-170.
[64] Michael Scharf, (n 7), 79.
[65] Harry Gould, *The legacy of punishment in international law*, (1st edn, Palgrave Macmillan, 2010) 82
[66] Mitsue Inazumi, *Universal jurisdiction in modern international law: expansion of national jurisdiction for prosecuting serious crimes under international law*, (1st edn, Belgium, Intersentia Antwerp, 2005) 117.

crimes. However, they are practically, theoretically and historically different.[67] In this matter, Mitsue Inazumi argued that the resemblance in the overall purposes do not lead automatically to the outcome that they must be applied in the same way.[68] In addition, the report of the Secretary-General of the United Nations mentioned the distinction between UJ and international criminal jurisdiction. In this matter, it was argued that despite the two jurisdictions share the same purpose, they cannot be interchangeable because they are complementary to each other.[69]

Through analysing the historical, theoretical and practical basis of the two jurisdictions the following differences can be observed. Historically, the emergence of UJ preceded the emergence of international criminal jurisdiction. As noted in Chapter Two, the concept of UJ has been recognised internationally over the crime of piracy.[70] Additionally, the scope of its practice was expanded to include war crimes and others following the Second World War.[71] By contrast, international criminal jurisdiction appeared in the wake of the First World War with the provision for a special criminal court to try the Kaiser of Germany, Wilhelm II.[72] However, that jurisdiction was not exercised because Wilhelm II fled to Holland, which refused to extradite him because the charges were considered by the Dutch Government to include retroactive criminal law.[73] Therefore, international criminal jurisdiction was exercised following the Second World War at the Nuremberg, Tokyo, Rwanda and Yugoslavia criminal tribunals.[74] Accordingly, it can be concluded that UJ was practiced before international criminal jurisdiction.

[67] Ibid, 114-119.
[68] Ibid.
[69] Report of the UN Secretary-General, (n 10), para 23, p.8.
[70] Dan Jerker B. Svantesson, 'A New Jurisprudential Framework for Jurisdiction: Beyond the Harvard Draft', (2015) 109 American Journal of International Law Unbound 69.
[71] Report of the ILA, (n 6), 3. See also Willard B. Cowles, 'Universal Jurisdiction over War Crimes', (1945) 33 California Law Review 177, 180.
[72] Treaty of Peace Between the Allied and Associated Powers and Germany (Treaty of Versailles), June 28, 1919, 11 For. Rel. (Paris Peace Conference, XIII), art. 227-228. See also William A. Schabas, *An Introduction to the International Criminal Court*, (4th edn, Cambridge University Press, 2011) 3.
[73] Ibid.
[74] Gerhard Erasmus and Gerhard Kemp, 'Application of International Criminal Law before Domestic Courts in the Light of Recent Developments in International and Constitutional Law', (2002) 27 South African Yearbook of International Law 66.

In theory, international criminal jurisdiction is established by the international instruments that determine the scope of its practice.[75] By contrast, UJ over international crimes is recognised by international customary law or implicitly by international conventional law.[76] In other words, the existence of UJ does not require an international instrument providing such jurisdiction, unlike international criminal jurisdiction, whose existence needs to be provided in an international instrument.

This observation leads to the practical difference between the two jurisdictions, since UJ differs from international criminal jurisdiction in that the former is practiced to date by the national courts of states and the other is always exercised by an international institution.[77] Additionally, unlike international criminal jurisdiction, UJ cannot be exercised over the holders of diplomatic immunity.[78] As mentioned in the previous chapter, in the arrest warrant against the Minister of Foreign Affairs of Congo, Mr. Abdulaye Yerodia Ndombasi, the ICJ argued that diplomatic immunity should not be overridden if the trial is taken before a national court.[79] This is due to two main reasons, the first is that the exercise of international criminal jurisdiction over the holders of diplomatic immunity is an exception from a general provision expressly provided in the international instrument.[80] In fact, these international instruments often allow the exercise of such jurisdiction over the holders of diplomatic immunity. For instance, Article 7 of Nuremberg Charter stated that "[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment".[81] Additionally, Article 6 of the Tokyo Charter , Article 7 of the ICTY statute and Article 6 of the ICTR statute allow the exercise of international criminal jurisdiction over the holders of

[75] Antonio Cassese, *International Criminal Law*, (1st edn, Oxford University Press, 2003), 267–271.
[76] Report of the ILA, (n 6), 3. See also Robert Cryer, (n 8), 50.
[77] AU–EU Technical Ad hoc Expert Group Report on the Principle of Universal Jurisdiction, Council of The European Union, Brussels, (April 16, 2009), Doc. No. 8672/1/09 REV 1, para 28-29.
[78] JIA Bingbing, 'Immunity for State Officials from Foreign Jurisdiction for International Crimes', in Morten Bergsmo and Ling Yan (eds), *State Sovereignty and International Criminal Law*, (Beijing: Torkel Opsahl Academic EPublisher, 2012) 75-77.
[79] Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), International Court of Justice (ICJ), 14 February 2002, Immunity and inviolability of an incumbent Foreign Minister in general (paras. 47-55) p 18-20. See also See also Gabriel Bottini, (n 53), 507.
[80] Antonio Cassese, (n 75), 267–271. See also JIA Bingbing, (n 78), 75-77.
[81] Nuremberg Charter, (n 9), art 7.

diplomatic immunity.[82] Secondly, international criminal jurisdiction is always exercised by an international institution.[83] Thus, the possibility of misuse in exercising criminal jurisdiction for national political purposes is less likely as this jurisdiction is exercised by an international institution. Accordingly, it can be argued that the exercise of UJ by a national court does not detract from the need to respect diplomatic immunity.

In general, it can be concluded that international criminal jurisdiction should not be confused with UJ, since UJ is exercised by national courts of any state when the legal conditions are met.[84] In addition, there is no legal condition that requires that UJ should be limited to being exercised by national courts only. However, there are no examples of the practice of UJ by an international tribunal. By contrast, the most important feature of UJ is that the exercise of UJ is not limited international crimes committed in a specific country or by citizens of these countries, but rather, it can be exercised over international crimes committed in, and by citizens of, any countries in the world.[85] Additionally, the principle of universality is not the legal basis for establishing international criminal jurisdiction.[86] This is because international criminal jurisdiction, like UJ, is based on the impact of the crimes on the international community as whole. Secondly, UJ and international criminal jurisdiction are independent, despite their sharing the same purpose. However, they are complementary to each other in achieving their purpose.

5.3: Unsuccessful Attempts to Grant the ICC UJ

Unlike the international criminal tribunals of Nuremberg, Tokyo, Yugoslavia and Rwanda, the ICC was established to be permanent and not limited to offenses committed in a specific state.[87] However, the jurisdiction granted to the ICC is not UJ.[88] Therefore, the question that arises is why UJ was not granted to the ICC when it was established as a permanent court to

[82] See Tokyo Charter, (n 9), art 6; ICTY Statute, (n 38), art 7; ICTR Statute, (n 38), art6; Rome Statute of the International Criminal Court art. 1, July 17, 1998, 2187 U.N.T.S. 90 (amended 2010), art 27.
[83] Gabriel Bottini, (n 53), 513.
[84] Ibid, 513.
[85] Eugene Kontorovich, (n 52), 184.
[86] Leila Nadya Sadat, (n 61), 246. See also Ariel Lett, (n 62), 560.
[87] Bernhard Graefrath, (n 16), 81-85.
[88] Ademola Abass, (n 37), 371-372.

fill the gap of impunity for the most serious international crimes. To answer this question, the study will discuss three main points, the first of which is the nature of the ICC's jurisdiction and the discussion of why its jurisdiction is considered to be international criminal jurisdiction rather than UJ. Secondly, the research will discuss the proposals made during the Rome Conference to give the ICC UJ and then discuss the reasons behind its rejection.

5.3.1: The Restrictions on the ICC's Jurisdiction under Rome Statute

The ICC was not granted the ability to exercise UJ.[89] The Rome Statute grants the ICC jurisdiction to try individuals, so long as the ICC has a connection to the crime.[90] This connection can be that the defendant or the crime-scene belongs to an ICC state party.[91] Additionally, the ICC may also exercise its jurisdiction over non-state parties in two specific circumstances. The first of these is where a non-state party accepts the Court's jurisdiction by ad-hoc consent.[92] The second circumstance involves the United Nation's Security Council (UNSC) referring a situation to the ICC.[93] The second circumstance will be discussed later in this chapter.

The jurisdiction granted to the ICC is unlike UJ because it cannot be exercised against any person who commits one of the international crimes, regardless of his or her nationality and the territory where the crimes are committed.[94] Rather, the jurisdiction of the ICC under the Rome Statute is restricted and not absolute.[95] In general, the restrictions on the ICC's jurisdiction can be classified as follows: firstly, the consent of individual states as a prerequisite for the exercise of the ICC's jurisdiction with the exception of a Security Council referral.[96] Secondly, the territorial and personal limitation on the ICC's jurisdiction, which involves the place of commission of the crimes and the nationality of the accused.[97] Thirdly,

[89] Ibid.
[90] Petra Baumruk, *The Still Evolving Principle of Universal Jurisdiction,* (PhD Thesis Charles University in Prague, 2015) 35-36.
[91] Rome Statute, (n 43), Art. 12(1), (2)(a), (2)(b).
[92] Ibid, Art.12(3).
[93] Ibid, Art.13(b).
[94] Anthony J. Colangelo, (n 51), 130. See also Olympia Bekou and Robert Cryer, (n 36), 54-55.
[95] Dalila Hoover, 'Universal jurisdiction not so universal: time to delegate to the International Criminal Court?', (2011) 8 Eyes on the International Criminal 73, 89.
[96] Olympia Bekou and Robert Cryer, (n 36), 50
[97] Dapo Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits', (2003) 1 Journal of International Criminal Justice 618, 621.

the objective and temporal limitation on the ICC's jurisdiction.[98] These issues will be evaluated in order to clarify the reasons for considering the ICC's jurisdiction as international criminal jurisdiction rather than UJ. In addition, during this discussion, the differences between UJ and international criminal jurisdiction of the ICC will be explored.

5.3.1.1: The ICC's Jurisdiction Based on the Consent of the States

The Rome Statute, under Article 12, explicitly provides that State consent is a prerequisite for the Court to exercise its jurisdiction over crimes committed in the territory of that State or by one of its nationals.[99] However, only referral by the UN Security Council has been excluded from this provision. According to article 13(b) the Security Council referring a situation to the ICC will enable the ICC's jurisdiction without state consent.[100] Indeed, this is an exception to the general provision of state consent to the ICC's jurisdiction.[101]

It is worth mentioning that a state's consent to ICC jurisdiction complies with the principle of free consent. This principle is mentioned in the Vienna Convention on the Law of Treaties under Article 34, which states that "[a] treaty does not create either obligations or rights for a third State without its consent".[102] In this matter, Louis Henkin argued that international law is developed on the principle of unanimity, so no state is obligated by any regulation or proposed norm without its consent.[103] In addition, the principle of unanimity is justified based on the principle of sovereignty and equality of states.[104] It is also worth mentioning that according to the Rome Statute, state consent to ICC jurisdiction has two forms. Firstly, by ratifying the Rome Statute and accepting the ICC jurisdiction, as provided in Article 12(a): "A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5".[105] Accordingly the ICC can exercise its jurisdiction over crimes committed in the territory of one of its state parties or by its

[98] Gabriel Bottini, (n 53), 503, 527-543. See also Ruth Phillips, 'The International Criminal Court Statute: Jurisdiction and Admissibility', (1999) 10 Criminal Law Forum 61, 62.
[99] Rome Statute, (n 43), Art.12. See also Olympia Bekou and Robert Cryer, (n 36), 50.
[100] Ibid, Art.13(b).
[101] Andrew Guzman, The Consent Problem in International Law, (Publisher eScholarship, University of California, 2011) 39.
[102] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, art 34.
[103] Louis Henkin, *How Nations Behave*, (2d edn. New York: Columbia University Press for the Council on Foreign Relations, 1979) 33.
[104] Ibid.
[105] Rome Statute, (n 43), Art.12(a).

nationals.[106] Secondly, a non-state party to the Rome Statute could accept the ICC jurisdiction by ad-hoc consent, as provided in article 12(3) "If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9".[107]

Accordingly, the requirement of state consent to the ICC's jurisdiction could be considered as the first distinction between UJ and the international criminal jurisdiction of the ICC.[108] As noted in the previous chapter, the exercise of UJ does not require the consent of another state if the crimes were committed in its territory or by one of its nationals.[109] Interestingly, although UJ will be exercised by a national court, it does not require the consent of the other state.[110] By contrast, the ICC's jurisdiction over the most serious crimes is conditioned by the states' consent, even though it will be exercised by an international institution.[111] The questions that can arise in this regard are, firstly, why the consent of the state is required for prosecuting crimes that are considered as *jus cogens* crimes, which must be fought by all countries. The second question concerns whether the states' consent includes *jus cogens* under international law or whether *jus cogens* should be applied even without state consent.

To answer these questions, it is necessary to distinguish between the need to combat international crimes and the ways in which this is carried out. As mentioned in the previous chapter, international crimes should not go unpunished, therefore the principle of *aut dedere aut judicare* is considered to be a requirement of *jus cogens*.[112] It is worth mentioning that the *jus cogens* is not subject to individual state consent because *jus cogens* are obligatory by

[106] Eugene Kontorovich, (n 52), 184.
[107] Rome Statute, (n 43), Art.12(3).
[108] Pavel Caban, 'Universal Jurisdiction Under Customary International Law, International Conventions and Criminal Law of the Czech Republic: Comments', (2013) 4 Czech Yearbook of Public & Private International Law 173, 185.
[109] Fannie Lafontaine 'Universal Jurisdiction the Realistic Utopia', (2012) 10 Journal of International Criminal Justice 1277, 1285.
[110] Gabriel Bottini, (n 53), 513.
[111] Rome Statute, (n 43), Art.12.
[112] International Law Commission, Report of the Working Group on the Obligation to extradite or prosecute (aut dedere aut judicare), Sixty-fifth session, Doc. No. A/CN.4/L.829, (22 July 2013), para24, p11. See also Report of the UN Secretary-General, (n 10), para 26, p.10.

international law and accepted by the international community as whole.[113] in this matter, Article 53 of the Vienna Convention on the Law of Treaties provided that

> a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[114]

Accordingly, it can be concluded that *jus cogens* under international law are not subject to individual state consent.[115]

Regarding ICC jurisdiction, the prosecution of international crimes by the ICC is not considered as *jus cogens*. This is because international crimes can be combated by exercising traditional forms of jurisdiction and UJ, as well as extraditing the offender to another state or an international court.[116] Consequently, a state's refusal to ratify the Rome Statute and accept the jurisdiction of the ICC does not mean that crimes will go unpunished. Rather, it means that the state does not want a court established by international treaty to have jurisdiction over crimes committed on its territory or by one of its citizens.[117] On the other hand, states which do not accept the ICC's jurisdiction still have an international obligation, either to try the accused or to extradite them to another State or an international court to try them if the international crimes committed in its territory or by one of its nationals.[118]

Accordingly, it can be argued that the ICC's jurisdiction is not considered *jus cogens*, so it can be subject to states' consent.[119] In addition, as the ICC was established by an international treaty, it is subject to Article 34 of the Vienna convention on the Law of Treaties.[120] Therefore,

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[113] Mahmoud Cherif Bassiouni, 'International Crimes: Jus Cogens and Obligatio Erga Omnes', (1996) 59 Law and Contemporary Problems 63, 63. See also Christian Tomuschat and Jean-Marc Thouvenin, *The Fundamental Rules Of The International Legal Order Jus Cogens And Obligations Erga Omnes*, (1st edn, Martinus Nijhoff Publishers, 2006) 269.
[114] Vienna Convention on the Law of Treaties, (n 102) art 53.
[115] Daniel Bodansky and J. Shand Watson, 'State Consent and the Sources of International Obligation', (1992) 86 Proceedings of the Annual Meeting (American Society of International Law) 108, 109-113.
[116] Daniel Nsereko, 'The ICC and Complementarity in Practice', (2013), 26 Leiden Journal of International Law 427, 428-431.
[117] Michael Scharf, (n 7), 108-110.
[118] Malcolm N Shaw, *International Law*, (6th edn. Cambridge University Press, 2008) 671-674.
[119] Rome Statute, (n 43), Art.12.
[120] Vienna Convention on the Law of Treaties, (n 102) art 34.

the provisions of the ICC Statute will not apply to a state that is not party to it and has not accepted the ICC's jurisdiction.[121] Hence, it can be concluded that the requirement of state consent to the ICC's jurisdiction is considered to be the distinction between UJ and international jurisdiction of the ICC.

5.3.1.2: Personal and Territorial Jurisdiction of the ICC

In addition to state consent discussed above, personal and territorial jurisdiction is another restriction to the ICC's jurisdiction. According to Article 12 of the Rome statute, the ICC's ability to exercise its jurisdiction over individuals depends on the territory where the international crimes are committed and the nationality of the offenders.[122] In other words, the ICC's jurisdiction cannot be exercised over anyone who has committed the crimes, or anywhere the crimes have been committed.[123] This is due to the fact that ICC's jurisdiction is based on the principles of territoriality and nationality.[124] In this regard, Article 12 (2) of the Rome Statute clearly states that the Court may exercise its jurisdiction over a state that is party to the Rome Statute when:

> (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national.[125]

Accordingly, it is clear that the ICC's jurisdiction is limited to the crimes that are committed in the territory of a state party, or when they are committed by a national of a state party unless the Security Council exception applies.[126]

According to Article 12 (3) of the Rome Statute, the ICC can exercise its jurisdiction over non-state parties if the state accepts the ICC's jurisdiction by *ad hoc* consent.[127] In addition to the *ad hoc* consent, the crimes should be committed in the territory of that state or by one of its nationals. Consequently, the ICC's jurisdiction is restricted by the national and territorial principles of jurisdiction. It is worth mentioning that unlike the ICC's jurisdiction, UJ is not

[121] Nicolaos Strapatsas, (n 36), 16.
[122] Rome Statute, (n 43), Art 12. See also Olympia Bekou and Robert Cryer, (n 36), 50.
[123] Dapo Akande, (n 97), 621.
[124] Rome Statute, (n 43), Art 12. See also, Cedric Ryngaert, 'The International Criminal Court and Universal Jurisdiction: A Fraught Relationship?', (2009)12 New Criminal Law Review: An International and Interdisciplinary Journal 498, 500-501
[125] Ibid, Art 12(2).
[126] Eugene Kontorovich, (n 52), 184.
[127] Rome Statute, (n 43), Art 12(3). See also Cedric Ryngaert, (n 124), 500-501.

restricted by the national and territorial principles .[128] As noted in the previous chapters, the exercise of UJ does not require any link between the crime, the accused and the forum state.[129] Rather, UJ can be exercised over international crimes regardless of who commits them and where they are committed.

In general, it can be argued that the ICC's jurisdiction cannot be classified as UJ. In addition, the restriction placed on the ICC's jurisdiction by the national and territorial principle could be considered as a second distinction between UJ and the international criminal jurisdiction of the ICC.

5.3.1.3: Jurisdiction *Ratione Materiae* and *Ratione Temporis* of the ICC

The crimes that can be subject to the ICC's jurisdiction are stipulated in Article 5 of the Rome Statute; they are: war crimes, crimes against humanity, the crime of genocide and the crime of aggression.[130] These crimes are described in detail under Articles 6, 7 and 8.[131] The crime of aggression is designated as a new crime under the Rome Statute, however the delegates at the Rome Conference failed to clearly define it.[132] However, in the Kampala conference in 2010, the crime of aggression was defined and came into force in 2017.[133] It is worth mentioning that the above crimes are no different from the crimes that are subject to UJ. This is because the ICC statute did not establish them, but rather they were adopted in accordance with foregoing crimes in existing international law.[134] In this matter, it was argued that "the universal criminality of the core international crimes – war crimes, crimes against humanity, genocide, and aggression – by claiming that they involve acts that are directly criminalized by international law, irrespective of domestic criminalization".[135]

There are, however, some differences between UJ and the jurisdiction of the ICC. For instance, the scope of UJ includes crimes that are not covered by the ICC's jurisdiction, such as crimes

[128] Anthony J. Colangelo, 'The Legal Limits of Universal Jurisdiction', (2006) 47 Virginia journal of international law 149, 162.
[129] Fannie Lafontaine (n 109), 1283. See also Anthony J. Colangelo, (n 51), 130.
[130] Rome Statute, (n 43), Art 5.
[131] Ibid, Art 6,7 and 8.
[132] Michael Scharf, (n 7), 85. See also Madeline Morris, 'The Democratic Dilemma of the International Criminal Court', (2002) 5 Buffalo Criminal Law Review 591, 598-599.
[133] Terje Einarsen, *The Concept of Universal Crimes in International Law*, (1st edn Oslo Torkel Opsahl Academic EPublisher 2012). 213.
[134] Kevin Jon Heller, (n 28), 38-39.
[135] Ibid, 41.

of piracy, slavery and torture.[136] On the other hand, the ICC's jurisdiction is restricted to being exercised only over the crime of genocide, crimes against humanity, war crimes and the crime of aggression.[137] Accordingly, the crimes under the jurisdiction of the ICC are provided exclusively and clearly in the Rome Statute, but the crimes under UJ are still disputed, as discussed in Chapter 3. In fact, as mentioned in the previous two chapters, states differ in the definition of the crimes and the scope of UJ in their domestic laws.[138] The reason for these differences are that the principle of UJ over international crimes is still developing and there are no clear international texts regulating its exercise.[139] Accordingly, the difference in the scope of crimes could be considered the third distinction between UJ and the international criminal jurisdiction of the ICC.

Additionally, there is a temporal limit on the court's jurisdiction. In this regard, Article 11(1) of the Rome Statute provided that ''The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute''.[140] In fact, the ICC entered into force on July 1, 2002, which means that the ICC has jurisdiction over crimes committed after the first of July 2002,[141] but the ICC does not have jurisdiction over crimes that took place before that day.[142] It is also important to highlight that according to Article 11(2), if states become a party to the Rome Statute after July 1, 2002, the temporal jurisdiction of the ICC will begin after the state's ratification to the Rome Statute.[143] Thus, the jurisdiction of the ICC, in this situation, depends on when the state ratified the Rome Statute. Regarding the distinction between the international criminal jurisdiction of the ICC and UJ, the temporal jurisdiction of the ICC could be considered the fourth difference between them as UJ is not time bound.[144]

Hence, the jurisdiction granted to the ICC is not UJ because it cannot be exercised over any person that commits an international crime, regardless of his or her nationality and the territory where the crimes are committed. In other words, the ICC's jurisdiction under the

[136] Mahmoud Cherif Bassiouni, (n 5), 107. See also Kevin Jon Heller, (n 28), 1-4.
[137] Rome Statute, (n 43), Art 5.
[138] Amnesty International, 'Universal Jurisdiction Preliminary Survey of Legislation around the World – 2012 Update', Index: IOR 53/019/2012, October 2012, 12-16.
[139] Mahmoud Cherif Bassiouni, (n 5), 82.
[140] Rome Statute, (n 43), Art 11(1).
[141] Gabriel Bottini, (n 53), 503.
[142] Olympia Bekou and Robert Cryer, (n 36), 50. See also Ruth Phillips, (n 98), 62.
[143] Rome Statute, (n 43), Art 11 (2).
[144] Petra Baumruk, (n 90), 53

Rome Statute, unlike UJ, is restricted by the consent of states. In addition, the ICC's jurisdiction is restricted by the territorial and national principle of jurisdiction, so it cannot be exercised against any person who commits one of the international crimes. Finally, it is restricted by a temporal limitation, so it cannot be exercised over crimes committed before the entry into force of the Rome Statute. The following section will discuss the reasons behind the rejection of granting the ICC UJ.

5.3.2: Analysing the Rejected Proposals to Grant the ICC UJ

As mentioned above, in 1994 the ILC submitted a draft of the Court Statute.[145] However, the exercise of UJ was not proposed as the Court's jurisdiction.[146] A few years later, at the Rome conference on the Establishment of the ICC, the issue of exercising UJ through the court was discussed. In this matter, Germany and South Korea proposed granting the envisioned court UJ.[147] However, the proposals were rejected, and the envisioned court was established in 1998 without UJ.[148] The reasons that led the ICC jurisdiction to not include UJ over international crimes are discussed below, as well as the German and South Korean proposals for granting the ICC UJ. The rejection of these proposal will be examined to find out the reasons behind the rejection and the question of whether these reasons could prevent the possibility for granting UJ to a new international court in future, are considered later in the thesis.

5.3.2.1: The German Proposal to Delegate the ICC Absolute UJ

The most ambitious proposal during the negotiations of the Rome Statute was a German proposal[149] that went beyond the draft statute of the ICC 1994 by the ILC.[150] As noted before the ILC provided in the draft statute that the jurisdiction of the court needs the consent of the state where the suspect is in custody and the territorial state.[151] However, the German proposal aimed to grant absolute UJ to the ICC.[152] The German proposal argued that the ICC should grant an automatic and unlimited criminal jurisdiction over genocide, war crimes and

[145] Draft Statute for ICC, (n 34), art 22-23.
[146] Ibid. See also Robert Cryer, (n 8), 167.
[147] Nicolaos Strapatsas, (n 36), 16. See also Olympia Bekou and Robert Cryer, (n 36), 53-55.
[148] Ademola Abass, (n 37), 371-372.
[149] Ibid.
[150] Draft Statute for ICC, (n 34), art 21-24.
[151] Ibid.
[152] Olympia Bekou and Robert Cryer, (n 36), 51.

crimes against humanity.[153] Additionally, this jurisdiction should not be restricted by state consent or by the territorial and national links of criminal jurisdiction.[154] It is worth mentioning that the German proposal relied on the notion that UJ could be applied by national courts.[155] It was claimed that all states could exercise UJ over the international crimes, regardless of the nationality of the offenders and the victims, and regardless of the territory where the crimes were committed. Accordingly, the ICC, which was established by an international treaty, should exercise the same UJ over international crimes in the same method as its states' parties do.[156] In other words, the German proposal assumed that as long as the state parties have the right to exercise UJ over genocide, war crimes and crimes against humanity, such jurisdiction should be exercised by the ICC.[157]

It is clear that this proposal assumed that the ICC would exercise UJ via delegation by states. In other words, UJ was assumed to be exercised by the ICC on behalf of states. This view was supported by number of scholars, such as Dapo Akande, Gennady M. Danilenko and Hans-Peter Kaul.[158] Hans claimed that

> [t]he universality approach starts from the assumption that, under current international law, all States may exercise universal jurisdiction over these core crimes. It combines this assumption with the very simple idea that States must be entitled to do collectively what they have the power to do individually. Therefore, States may agree to confer this individual power on a judicial entity they have established and sustain together, and which acts on their behalf.[159]

Theoretically, the view of collectively exercised UJ can be supported because if all states can undertake certain legal actions individually, there is nothing preventing them from doing so collectively. In addition, the collective exercising of a legal action may help to prevent its misuse. However, critics used Article 34 of the VCLT as an argument against this proposal.[160] The argument assumed that granting UJ to the ICC would lead to the creation of an obligation

[153] Hans-Peter Kaul, 'Preconditions to the Exercise of Jurisdiction', in Antonio Cassese (eds.), *The Rome Statute of International Criminal Court: A Commentary*, (Oxford, Oxford University Press, 2002), 595.
[154] Ademola Abass, (n 37), 371-372.
[155] Ibid.
[156] Young Sok Kim, 'The Preconditions to the Exercise of the jurisdiction of the International Criminal Court with Focus on Article 12 of the Rome Statute', (1999) 8 Journal of International Law and Practice, 79.
[157] Dapo Akande, (n 97), 621-622.
[158] Ademola Abass, (n 37), 375.
[159] Hans-Peter Kaul, (n 153), 587.
[160] Olympia Bekou and Robert Cryer, (n 36), 51.

on States that are not party to the Rome Statute.[161] In this matter, it is necessary to distinguish between the objection of states to the exercise of UJ and the establishment of the ICC with UJ.

Firstly, as noted before, the principle of UJ is recognised under international law, so it could not be refuted as international legal principle.[162] In addition, the exercise of this legal principle by an individual state or collectively between a number of states also could not be refuted, [163] as the cooperation between Senegal and the African Union in the Habré trial is a clear example of the collective exercise of UJ.[164]

By contrast, the establishment of a new international organ with UJ by international treaty needs to have states' consent.[165] Otherwise, it might conflict with article 34 of the VCTL which does not permit the establishment of a legal obligation by treaty on states that have not accepted that obligation.[166] In this matter, the establishment of an independent international court with UJ over all countries could be considered a legal obligation. Specifically, the German proposal aimed to give the ICC an absolute UJ, which means that the prosecutor of the ICC would be empowered to investigate international crimes committed anywhere in the world. In this matter, the United States of America (US) considered that any authority that is given the ability to prosecute US citizens as a threat to its sovereignty.[167] Thus, the US strongly opposed any authority allowing jurisdiction over US citizens without its consent.[168] Accordingly, the granting of UJ to the ICC requires state consent, otherwise it will be refused.[169]

It is worth mentioning that the establishment of the ICC with UJ is not considered as *jus cogens,* which means that it is not subject of Article 53 of the VCTL.[170] Accordingly, it can be

[161] Madeline Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States', (2001) 64 Law and Contemporary Problems 13, 26.
[162] Mahmoud Cherif Bassiouni, (n 5), 82.
[163] Hans-Peter Kaul, (n 153), 587.
[164] Human Rights Watch, Senegal: Hissène Habré Verdict Scheduled May 30, 3 May 2016, available at http://www.refworld.org/docid/5729b3544.html [accessed 26 July 2018].
[165] Ademola Abass, (n 37), 381.
[166] Vienna Convention on the Law of Treaties, (n 102) art 34.
[167] Bartram S Brown, 'U.S. objections to the statute of the International Criminal Court: a brief response', (1999) 31 Journal of International Law and Politics 855, 880.
[168] Monroe Leigh, 'The United States and the Statute of Rome', (2001) 95 The American Journal of International Law 124, 128.
[169] Michael Scharf, (n 7), 108-110.
[170] Vienna Convention on the Law of Treaties, (n 102) art 53.

argued that as long as the ICC is established under an international treaty, invoking Article 34 of the VCTL to reject its proposed UJ would be accepted. In addition to the above-mentioned criticisms, there was strong opposition to the German proposal by countries such as the US that prevented its approval.[171] It is worth mentioning that, the exercise of UJ by international courts in general had been criticised even before the ICC Statue was drafted and discussed.[172] Critics argued that it would be impossible for an international criminal court alone to try and punish the huge number of offenders who have allegedly committed international crimes,[173] not only because the number of crimes, but also because these crimes are usually committed as part of a general policy that involves large numbers of participants.[174]

It can be concluded from this analysis that states can exercise UJ collectively.[175] However, the creation of an international court with UJ by international treaty would be criticised. This is because the establishment of an international court over all states would contradict with the provisions of Article 34 of the VCTL, let alone granting the court UJ over all states, including the states that did not agree to its creation.

5.3.2.2: The South Korean Proposal to Grant the ICC a Conditional UJ

Unlike the German proposal, the South Korean proposal was more realistic, suggesting that the ICC should be granted a restricted UJ.[176] In fact, the South Korean proposal suggested that the ICC shall have automatic jurisdiction based on the principles of passive personality, nationality, territoriality and the jurisdiction of the custodial State.[177] Philosophically, the Korean proposal however, does not differ from the German proposal because both proposals aimed to grant the ICC UJ.[178] Indeed, the two proposals share the following characteristics:

[171] Nicolaos Strapatsas, (n 36), 17.
[172] Yearbook of the ILC 1996, (n 1), 28.
[173] Kevin Jon Heller, (n 28), 54.
[174] Yearbook of the ILC 1996, (n 1), 28.
[175] Such as the cooperation between Senegal and the African Union in the Habré trial which discussed in the previous chapter and used as example for the exercise of the universal jurisdiction collectively. See Human Rights Watch, (n 164). See also Human Rights Watch, The Case of Hissène Habré before the Extraordinary African Chambers in Senegal: Questions and Answers, 27 April 2015, available at http://www.refworld.org/docid/554088204.html [accessed 26 July 2018]
[176] Nicolaos Strapatsas, (n 36), 17.
[177] Olympia Bekou and Robert Cryer, (n 36), 51.
[178] Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*, (3rd edn, C.H. Beck, Hart, Nomos, 2016) 677.

firstly, the desire to establish an international criminal court under international treaty. Secondly, the granting of UJ to the Court, which may include all states of the world, even those who have not agreed to the establishment of the Court. The only difference between them was the imposition of a restriction on UJ.[179] The restriction involved the requirement of the presence of the accused in the territory of a state party to the ICC as a condition for the exercise of UJ.[180] It was suggested that if the South Korean proposal was accepted, the ICC would have conditional UJ.[181] Indeed, the Korean proposal aimed to avoid a legal dispute over absolute UJ, which has not yet been solved. Therefore, it linked the exercise of universal judication to the presence of the accused on the territory of the State.[182] Conditional UJ exercised by national courts was discussed in Chapter 4 where it was argued that conditional UJ is less controversial, more realistic and more effective.[183] Additionally, it was claimed at the sixty-ninth session of the UN General Assembly that there is a tendency among states to favour the restrictive or conditional exercise of UJ by national courts.[184]

Despite the wide acceptance of conditional UJ under international law, this did not help to support granting the ICC conditional UJ. This was due to the fact that the Korean proposal was opposed by states wishing to rely on state consent as the basis for the Court's jurisdiction.[185] The argument that was used to reject the German proposal was also used to reject the Korean proposal. Indeed, the argument assumed that granting UJ , even conditional, to the ICC would lead to the creation of an obligation on states that are not party to the Rome Statute.[186] Additionally, the absolute rejection by states prevented the granting of any form of UJ to the ICC.[187] In this regard, it was claimed that states did not reject the exercise of UJ as a legal principle, but rejected granting the ICC jurisdiction over states that did not consent to the establishment of the court.

[179] Cedric Ryngaert, (n 124), 500.
[180] Otto Triffterer and Kai Ambos (eds), (n 178), 677.
[181] Olympia Bekou and Robert Cryer, (n 36), 51.
[182] Nicolaos Strapatsas, (n 36), 17.
[183] Fannie Lafontaine, (n 109), 1283.
[184] Report of the UN Secretary-General, The scope and application of the principle of universal jurisdiction, Sixty-ninth session, UN. Doc. No. A/69/174 (23 July 2014). See also Rephael Ben-Ari, (n 63), 170.
[185] Otto Triffterer and Kai Ambos (eds), (n 178), 677.
[186]Madeline Morris, (n 161), 26. See also Louis Henkin, (n 103), 33.
[187] Olympia Bekou and Robert Cryer, (n 36), 51.

It can be concluded that the establishment of any international criminal court under an international treaty and granting this court universal mandate would be almost impossible in the presence of Article 34 of the VCLT. In addition, states having veto powers in the Security Council makes giving a court any form of UJ unlikely.

5.3.2.3: The Political Interests of States as an Incentive to Object Granting UJ to the ICC

In addition to the aforementioned legal reasons, the political interests of states were an incentive for objecting to the granting of UJ to the ICC.[188] It was argued that the political interests of states such as the US, Russia and China have played a prominent role in preventing the Court from being granted UJ.[189] Louis Henkin, for almost five decades, has mentioned that "One frequently encounters the view that international law is made by the powerful few to support their particular interests".[190] Additionally, he has argued that international law cannot be imposed if the most powerful states reject it.[191] This is due to the fact that states' compliance with the provisions of international law depends on the compatibility of their interests with the law.[192] Accordingly, the role of political factors will be taken into consideration in this section.

As mentioned above, some permanent members of the Security Council, including Russia, China and the US have played a prominent role in preventing the ICC from being granted UJ. It was argued that the US provided the most prominent opposition.[193] In fact, the US has refused to grant any form of UJ to the ICC. Furthermore, it has made it clear that it will oppose and thwart the ICC if it is granted UJ.[194] Indeed, the US was worried that Americans would be subject to the jurisdiction of the Court without consent, [195] especially with the presence of a number of US forces in different parts of the world.[196] Similarly, Russia opposed giving the ICC

[188] Máximo Langer, (n 8), 10.
[189] Gennady Esakov, 'International Criminal Law and Russia: From 'Nuremberg' Passion to 'The Hague' Prejudice', (2017) 69 Europe-Asia Studies 1184, 1197.
[190] Louis Henkin, (n 103), 10.
[191] Ibid, 23.
[192] Ibid, 49.
[193] Olympia Bekou and Robert Cryer, (n 36), 54.
[194] William A Schabas, (n 72), 75.
[195] Monroe Leigh, (n 168), 126.
[196] Michael Scharf, (n 7),69

UJ to avoid subjecting its nationals to the ICC's jurisdiction.[197] China, despite rarely having its troops outside Chinese territory, has also opposed giving the ICC UJ.[198] China's opposition was less severe than the US,[199] and it was argued that "[i]t seems reasonably clear that Chinese opposition to the ICC would be more vocal, and probably more active, had it felt that its nationals were at risk of prosecution before the ICC".[200]

Opposition was not limited to countries with permanent membership in the Security Council, but included others like India, the country with the second largest population in the world.[201] Although, India did not explicitly oppose UJ, its tendency was to reject it.[202] In this regard, it was argued that India aimed to avoid subjecting its citizens to the jurisdiction of the court without its consent, especially with regard to the allegations of committing international crimes in the territory of Kashmir.[203]

As an alternative for granting UJ to the ICC, the US exercised its diplomatic and political efforts to pass a proposal to give the Security Council the authority to refer.[204] In this matter, Russia and China strongly supported this proposal because it would further protect their citizens from the court's jurisdiction through their veto powers.[205] Consequently, article 13(b) of the Rome Statute was adopted that allowed the Security Council to refer any threats to international peace and security to the ICC without State consent.[206] Interestingly, it was argued that these three countries and their allies would not be subject to the ICC's jurisdiction through the referral authority granted to the Security Council because of the veto power.[207]

Based on the foregoing analysis, it can be observed that the opposition of powerful countries prevented the Court from being granted UJ. This observation can be added to the conclusion

[197] Bakhtiyar Tuzmukhamedov, 'The ICC and Russian Constitutional Problems', (2005) 3 Journal of International Criminal Justice 621, 621-624.
[198] Ademola Abass, (n 37), 373.
[199] Olympia Bekou and Robert Cryer, (n 36), 54.
[200] Ibid.
[201] Francisco Orrego Vicuna, 'The International Criminal Court and the In and Out Club', (2004) 2 Journal of International Criminal Justice 35, 36.
[202] Ademola Abass, (n 37), 373.
[203] Olympia Bekou and Robert Cryer, (n 36), 54.
[204] Otto Triffterer and Kai Ambos (eds), (n 178), 678. See also William A. Schabas, (n 72), 168; Draft Statute for ICC, (n 34), art 23.
[205] Francisco Orrego Vicuna, (n 201), 35-36.
[206] Rome Statute, (n 43), Art.13(b).
[207] Manisuli Ssenyonjo, 'The Rise of the African Union Opposition to the International Criminal Court's Investigations and Prosecutions of African Leaders', (2013) 13 International Criminal Law Review 385, 425.

reached in the previous chapter, which showed that political pressure by powerful states led to narrowing the exercise of UJ by national courts, as in Belgium after the pressures exerted by the US.[208] On the basis of these two observations, it can be argued that the permanent members sought to prevent the ICC from exercising UJ over their own citizens.[209] Additionally, the above-mentioned positions of these states can be used as an example to support Henkin's statement that a few powerful states formulate international law to support their particular interests.[210] Accordingly, it can be concluded that the powerful states would prevent any form of UJ being exercised by an international tribunal over their own citizens in the future.

5.4: The Security Council's Referral as an Alternative for Granting the ICC UJ

As mentioned above, the powerful states supported the proposal for authorising the Security Council the ability to refer any situation to the ICC as an alternative to granting the ICC UJ.[211] Hence, the ICC Statute under article 13(b) adopted this proposal. In fact, article 13provided that

> The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:[…] b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.[212]

Accordingly, the Security Council, when acting under chapter 7 of the UN Charter, are allowed to refer any instance of the committing of international crimes to the ICC, regardless of who commits them and where they are committed.[213] It has been suggested that as long as the Security Council can refer any situation to the ICC, this could be considered as a potential

[208] Jana Panakova, 'Law and politics of universal jurisdiction', (2011) 3 Amsterdam law forum 49, 57-60.
[209] Olympia Bekou and Robert Cryer, (n 36), 54-55.
[210] Louis Henkin, (n 103), 10.
[211] Otto Triffterer and Kai Ambos (eds), (n 178), 678. See also William A. Schabas, (n 72), 168. See also Draft Statute for ICC, (n 34), art 23.
[212] Rome Statute, (n 43), Art.13.
[213] Dapo Akande, (n 97), 618-619.

exercising of UJ.[214] This argument was supported by the role of the security council to maintain international peace and security in Yugoslavia and Rwanda through the establishment of the ICTY and ICTR.[215] The question that arises is whether the role of the Security Council in referring situations to the ICC could be considered as an instance of UJ. To answer this question, the research will firstly provide a brief background on the role of the Security Council in establishing the international criminal tribunals the ICTY and ICTR. Here, the legal basis on which the Security Council relied to establish the tribunals and its relationship with UJ will be discussed. Secondly, the research will discuss the nature of the Security Council's referral to the ICC and its relationship to UJ.

5.4.1: Brief Background on the Security Council and its Role in Establishing International Criminal Tribunals

Following the end of the Second World War, the United Nations (UN) was established in 1945.[216] The UN Charter established the Security Council as the most powerful organ of the UN in order to maintain international peace and security.[217] The first goal that the UN was the maintenance of international peace and security as stipulated in Article 1 of the Charter.[218] Under Article 24 of the UN Charter, this task is entrusted to the Security Council on behalf of the UN.[219] The Article states that "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter".[220] There are five permanent members at the Security Council, the USSR, now Russia, USA, France, China, and the UK.[221] The permanent members have been given veto power over Security Council resolutions;[222] accordingly, any one of the permanent members can prevent the adoption of any draft resolution within the Council, even if all other members agree.[223]

[214] Nicolaos Strapatsas, (n 36), 18. See also Leila Nadya Sadat & Richard Carden, 'The New International Criminal Court: An Uneasy Revolution', (2000) 88 The Georgetown Law Journal 381, 407-411.
[215] Leila Nadya Sadat, (n 61), 246.
[216] United Nation, (n 11).
[217] Daniel Deudney and Hanns W. Maull, 'How Britain and France Could Reform the UN Security Council', (2011) 53 Survival: Global Politics and Strategy 107, 108.
[218] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Art. 1, [hereinafter Charter of the UN].
[219] Ibid, Art. 24.
[220] Ibid, Art. 25.
[221] Malcolm Shaw, (n 118), 3.
[222] Charter of the UN, (n 218), Art. 23.
[223] Ibid, Art. 27. See also Malcolm Shaw, (n 118), 1206-1207.

In this regard, it was argued that the permanent members of the Security Council have used their veto power to prevent issuing any resolution contradictory to their political interests or their allies' interests.[224] Accordingly, the composition of the Security Council has been criticised and reform has been demanded .[225] However, it was reformed only in the 1960s by raising the number of non-permanent members from six to ten.[226] By contrast, the number of permanent members and their veto power have yet not reformed.[227]

The composition of the Security Council and its voting mechanism have a significant impact on Security Council resolutions.[228] In this regard, the ability of the Security Council to achieve international peace and security was limited during the Cold War, which lasted from the late 1940s to the beginning of the 1990s.[229] This is due to divisions within the Security Council during the Cold War,[230] and the Security Council did not establish any international tribunals during the period.[231]

At the end of the Cold War in the 1990s, the Security Council had a prominent role in establishing the ICTY and ICTR to try the perpetrators of international crimes in Yugoslavia and Rwanda.[232] In fact, the significant number of international crimes that were committed in both countries prompted the Security Council to intervene and issue resolutions 827 for the establishment of the ICTY and 955 for the establishment of the ICTR.[233] The question that arises is whether the role of the Security Council in the establishment of the ICTY and ICTR was based on UJ. In other words, did the Security Council rely on the universal nature of the crimes to establish the tribunals?

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[224] Manisuli Ssenyonjo, (n 207), 425.

[225] Klaus Schlichtmann, 'An enduring concept for Security Council reform', (2011) 2 Beijing Law Review 97, 98-100.

[226] Charter of the UN, (n 218), Art. 23. See also, Marco Pedrazzi, 'Italy's approach to UN Security Council reform', (2000) 35 The International Spectator 49, 50.

[227] Justin Morris, 'UN Security Council Reform: A Counsel for the 21st Century', (2000) 31 Security Dialogue 265, 266.

[228] Daniel Deudney and Hanns W. Maull, (n 217), 107.

[229] Robert Cryer, (n 4), 48-50.

[230] Malcolm Shaw, (n 118), 1206-1207.

[231] Robert Cryer, (n 8), 122.

[232] William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, (Cambridge University Press, 2006) 71.

[233] UN Security Council, Security Council resolution 827 (1993) [Establishment of the International Criminal Tribunal for the former Yugoslavia], 25 May 1993, S/RES/827 (1993). [hereinafter, Security Council resolution 827]. See also UN Security Council, Security Council resolution 955 (1994) [Establishment of the International Criminal Tribunal for Rwanda], 8 November 1994, S/RES/955 (1994). [hereinafter, Security Council resolution 955].

In fact, the Security Council is not a judicial organ aimed at achieving criminal justice, but rather it is political organ that aims to maintain international peace and security.[234] The Security Council relies on Chapter VII of the United Nations Charter in the establishment of international criminal tribunals.[235] Articles 39, 40 and 41 of the United Nations Charter authorise the Security Council to adopt appropriate measures in the event of a threat to international peace and security, by way of example and without any limitation, Article 41 enumerates some of the measures.[236]

Though establishment of international tribunals was not mentioned explicitly in article 41,[237] there is no impediment for considering the establishment of international criminal tribunals as a measure that Security Council can adopt to maintain international peace and security.[238] Specifically, in Yugoslavia and Rwanda, the intervention of the Security Council was late because it came after international crimes were committed in both countries.[239] Consequently, the appropriate measure was the establishment of two international criminal tribunals for those accused of committing the crimes.[240] Security Council resolutions 827 and 955 explicitly provided that the situation in both countries threatened international peace and security. Accordingly, the Security Council decided to establish two tribunals, convinced that it would achieve through these tribunals security and peace in both countries.[241]

In light of the above, it can be suggested that the Security Council did not base the establishment of the tribunals on the fact that the crimes had a universal nature, which means that their perpetrators must be tried regardless of their nationality or where the offences were committed.[242] However, the Security Council was motivated by the impact of the crimes committed on international peace and security.[243] Therefore, as mentioned before, the

[234] Daniel Deudney and Hanns W. Maull, (n 217), 107.
[235] William A. Schabas, (n 232), 48.
[236] Charter of the UN, (n 218), Art. 39,40 and 41.
[237] Ibid, Art. 41.
[238] William A. Schabas, (n 72), 168. See also Michael Scharf, 'The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal', (1999) 49 DePaul Law Review 925, 928–933.
[239] Ilias Bantekas and Susan Nash, *International Criminal Law*, (2nd edn, Cavendish Publishing Limited, 2003) 339-340.
[240] Payam Akhavan, 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment', (1996) 90 American Journal of International Law 501, 503.
[241] Security Council resolution 827, (n 233). See also Security Council resolution 955, (n 233).
[242] The Princeton Principles on Universal Jurisdiction, (2001) 28 Princeton University Program in Law and Public Affairs, 28-30. See also Anthony J. Colangelo, (n 128), 162.
[243] Security Council resolution 827, (n 233). See also Security Council resolution 955, (n 233).

jurisdiction granted to the ICTY and ICTR was international criminal jurisdiction, not UJ.[244] This is because the ICTY and ICTR jurisdictions were limited only to the crimes that were committed in Yugoslavia and Rwanda.[245] Hence, it can be concluded that the tribunals were set up in order to maintain international peace and security, not because the crimes are of the universal nature. Therefore, the Security Council did not rely on the concept of UJ for the establishment of the ICTY and ICTR.

5.4.2: The Nature of the Security Council's Referral to the ICC and its Relationship to UJ

According to Article 13(b) the Security Council, when acting under chapter 7 of the UN Charter, are able to refer any situation of international criminality to the ICC, regardless of who commits the crimes and where.[246] Therefore, the ICC could exercise its criminal jurisdiction when the Security Council makes a referral.[247] The referral could include the crimes that are committed by a national of any state, or occurred in the territory of any state, including states that are not party to the ICC.[248] As long as the Security Council, when acting under chapter 7 of the UN Charter can refer any situation to the ICC, this referral could be considered a potential use of UJ.[249] Here, it is necessary to examine the legal requirements of making a referral and then analyse the nature of ICC's jurisdiction over non-states parties based on the Security Council referral.

[244] Mitsue Inazumi, (n 66), 114-119.
[245] ICTY Statute, (n 38), art 1; ICTR Statute, (n 38), art 1. In fact, Article 1 of the ICTY Statute limited the Tribunal's jurisdiction over the crimes committed in the territory of Yugoslavia since 1991. Additionally, Article 1 of the ICTR Statute limited the Tribunal's jurisdiction over the crimes committed between 1 /1/ 1994 and 31 /12/ 1994 in the territory of Rwanda and such violations were committed by Rwandan citizens in the territory of neighbouring States.
[246] Dapo Akande, (n 97), 618-619.
[247] Ibid. See also Cedric Ryngaert, (n 124), 500-501.
[248] Michael Scharf, (n 7), 76. See also Robert Bellelli, *International criminal justice: law and practice from the Rome Statute to its review,* (1st edn. Ashgate Publishing Limited, 2010), 102-105.
[249] Nicolaos Strapatsas, (n 36), 18. See also Leila Nadya Sadat & Richard Carden, (n 214), 407-411.

5.4.2.1: The Legal Requirements for Making a Referral

Article 13 of the Rome Statute, sets down the legal requirements for making a referral:

> The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:[…]b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nation[250]

Accordingly, the Security Council referral should involve the following three elements. Firstly, it must appear to the Security Council that one of the crimes provided under Article 5 has been committed.[251] According to Article 13 (b), it is clear that an appearance of committing the crimes is enough for the Security Council to refer that situation to the ICC.[252] Thus, the Security Council is not responsible for the prosecution of the crimes or the trial of the offenders because that is the task of the ICC.[253] Therefore, when the Security Council decides to refer any situation to the ICC, the president of the Security Council must notify the Secretary-General of the UN who will inform the referral to the prosecutor of the ICC.[254]

Secondly, the referral should be made by the Security Council; it is not permitted for other organs of the UN to do so.[255] It is worth mentioning that any resolution is issued by the Security Council, is subject to a particular voting mechanism, which is stipulated in Article 27 of the UN Charter.[256] The decision to refer a state situation should be made with the approval of nine of the Security Council members without any objection from the permanent members.[257] However, it was argued that the Permanent members of the Security Council

[250] Rome Statute, (n 43), Art.13.
[251] Ibid, Art. 5.
[252] Rome Statute, (n 43), Art 13(b).
[253] Mohamed M. El Zeidy, 'The Principle of Complementarity a New Machinery to Implement International Criminal Law', (2002) 23 Michigan Journal of International Law 869, 875.
[254] Ibid, 957-961. See also Jennifer Trahan, 'The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices', (2013) 24 Criminal Law Forum 417, 419-425.
[255] Rome Statute, (n 43), Art 13(b).
[256] Charter of the UN, (n 218), Art 27.
[257] Jennifer Trahan, (n 254), 419-425.

have used their veto power to prevent issuing resolutions that contradict their political interests or their allies' interests.[258].

The third legal requirement is that the referral of the Security Council must be made in accordance with Chapter VII of the UN Charter.[259] Therefore, the Security Council must perceive a threat to international peace and security.[260] In other words, the referral decision by the Security Council should aim to maintain international peace and security.[261]
As mentioned before, the Security Council resolution established the ICTY and ICTR because the situation in both countries threatened international peace and security.[262] Accordingly, the Security Council decided to establish the two tribunals, convinced that it would achieve through these tribunals the security and peace in both countries.[263]
Similarly, in accordance with article 13(b), the referral to the ICC should be in response to a perceived threat to international peace and security.[264] In this matter, Chapter VII of the UN Charter authorises the Security Council to adopt appropriate measures in the event of a threat to international peace and security.[265] Accordingly, the referral could be classified as one of the Security Council's measures that aims to maintain international peace and security.[266]

The question that arises is what legal criteria is used by the Security Council to classify a situation in any country as threatening to international peace and security? For example, is the commission of international crimes of a universal nature enough to consider a situation a threat to international peace and security?
Chapter VII of the UN Charter provides the Security Council absolute authority to determine whether a situation threatens international peace and security.[267] However, the charter does

[258] Manisuli Ssenyonjo, (n 207), 425. See also Abel Knottnerus, 'The Security Council and the International Criminal Court: The Unsolved Puzzle of Article 16', (2014) 61 Netherlands International Law Review 195, 196.
[259] Charter of the UN, (n 218), Art 39-41.
[260] Roberto Lavalle, 'A Vicious Storm in a Teacup: The Action by the United Nations Security Council to Narrow the Jurisdiction of the International Criminal Court', (2003) 14 Criminal Law Forum 195, 201.
[261] Jennifer Trahan, (n 254), 422.
[262] William A. Schabas, (n 232), 48.
[263] Security Council resolution 827, (n 233). See also Security Council resolution 955, (n 233).
[264] Ilias Bantekas and Susan Nash, *International Criminal Law*, (3rd edn, Routledge-Cavendish, London. 2007) 14.
[265] Charter of the UN, (n 218), Art. 39,40 and 41.
[266] Ibid, Art. 41. See also William A. Schabas, (n 72), 168; Michael Scharf, (n 238), 928–933.
[267] Jane Stromseth, David Wippman and Rosa Brooks, *Can Might Make Rights? Building the Rule of Law After Military Interventions*, (1st edn Cambridge: Cambridge university press, 2006) 23.

not stipulate any legal criteria for this decision, or assign any oversight authority to Security Council resolutions.[268] Accordingly, the Security Council resolution that considers a situation a threat to international peace and security is a political decision rather than a legal decision.[269] This is due to the fact that the Security Council is **not** a judicial organ but rather it is a political organ.[270] Secondly, the composition of the Security Council and the its voting mechanism have a significant impact on Security Council resolutions.[271] Accordingly, the Security Council has failed to refer a significant number of committing the crime with universal nature to the ICC,[272] such as the Syrian conflict, the Palestinian-Israeli conflict, or the situation of Myanmar.[273] Indeed, the Security Council has only referred the Sudanese and Libyan conflicts to the ICC.[274] Accordingly, it can be noticed that the referral mechanism cannot be considered a use of UJ.[275]

In light of the above analysis, it can be concluded that Article 13 does not rely on the universal nature of the crimes.[276] Since, the Security Council should act under Chapter VII of the UN Charter, which means that the referrals' situation should be considered a threat to international peace and security.[277] Indeed, the commission of crimes that have a universal nature is not enough to consider a situation as a threat to international peace and security.[278] As such a decision should be approved by nine of the Security Council members without any objection from the permanent members of the Security Council,[279] it can be argued that the mere commission of the crimes of universal nature may not be considered a threat to international peace and security. Thus, the Security Council referral could not be considered a use of UJ.[280]

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[268] Ibid, 93.
[269] Jennifer Trahan, (n 254), 422.
[270] Elias Olufemi and Quast Anneliese, 'The relationship between the Security Council and the International Criminal Court in the light of Resolution 1422 (2002)', (2003) 3 Non-State Actors and International Law 165, 167.
[271] Charter of the UN, (n 218), Art 27. See also Daniel Deudney and Hanns W. Maull, (n 217), 107.
[272] Manisuli Ssenyonjo, (n 207), 425. See also Rosa Aloisi, 'A Tale of Two Institutions: The United Nations Security Council and the International Criminal Court', (2013)13 International Criminal Law Review 147, 164-167.
[273] Ibid, 425-426. See also William A. Schabas, 'The banality of international justice', (2013) 11 Journal of International Criminal Justice 545, 547; Jennifer Trahan, (n 254), 470.
[274] S.C. Res. 1970, 1 4, U.N. Doc. S/RES/1970 (Feb. 26, 2011), SC Res. 1593 (2005), S/RES/1593 (31 March 2005).
[275] Nicolaos Strapatsas, (n 36), 18. See also Leila Nadya Sadat & Richard Carden, (n 214), 407-411.
[276] Rome Statute, (n 43), Art 13.
[277] Charter of the UN, (n 218), Art 39-41.
[278] Jane Stromseth, David Wippman and Rosa Brooks, (n 267), 23 and 93.
[279] Jennifer Trahan, (n 254), 419-425.
[280] Nicolaos Strapatsas, (n 36), 18. See also Leila Nadya Sadat & Richard Carden, (n 214), 407-411.

5.4.2.2: Analysing the Nature of the ICC's Jurisdiction over Non-State Parties Based on the Security Council referral

In the event that the Security Council makes a referral to the ICC, that state in question will be subject to ICC jurisdiction even if that state is not a party to the Court.[281] This is because states are obliged to comply with the Security Council's decisions under Article 25 and Article 103 of the Charter of the United Nations.[282] However, the decision of referral by the Security Council does not in any way mean a verdict against anyone. Rather, it is a decision authorising the Court to initiate investigations into allegations of committing an international crime in particular States, including non-states parties of the ICC.[283]

The decision of the referral by the Security Council allows the Prosecutor of the ICC to open an investigation.[284] However, in accordance with article 53 of the Rome Statute, the Prosecutor can decide that there is no reasonable basis to proceed or the prosecution is not in the interests of justice.[285] Therefore, the referral by the Security Council is not enough to initiate the trial automatically because the ICC's prosecutor must decide whether to initiate an investigation or not[286]

That said, the referral decision remains important because it is the legal authorisation that allows the ICC to exercise its criminal jurisdiction over non-states parties to the court.[287] This brings up the question about the nature of the ICC's jurisdiction over non-states parties based on the Security Council's referral, whether it is UJ or not.

As previously discussed, the ICC's jurisdiction is not UJ, rather it is international criminal jurisdiction. The jurisdiction granted to the ICC is unlike UJ because it cannot be exercised against any person who commits an international crime, regardless of his or her nationality and the territory where the crime was committed.[288] In fact, this view also includes the criminal jurisdiction that is exercised by the ICC over non-states parties based on the Security Council's referral. This is due to the fact that the decision of referral from the Security Council

[281] Michael Scharf, (n 7), 76.
[282] Charter of the UN, (n 218), Art 25 and 103.
[283] Jennifer Trahan, (n 254), 423.
[284] William A. Schabas, (n 72), 168-170.
[285] Rome Statute, (n 43), Art 53.
[286] Mohamed M. El Zeidy, (n 253), 959.
[287] Robert Bellelli, (n 248), 102-105.
[288] Anthony J. Colangelo, (n 51), 130. See also Olympia Bekou and Robert Cryer, (n 36), 54-55.

allows the court to exercise its jurisdiction over a particular State. The court cannot exercise its jurisdiction over crimes committed in other countries that are not party to the Court when their situation has not been referred by the Security Council.

As noted above, the Security Council's decision to make referral to the ICC depends on whether they consider the situation in that state to be a threat to international peace and security, rather than an evaluation of the universal nature of the crime.[289] In this matter, it was observed that as a consequence of political factors at the Security Council, it does not consider a number of universal crimes a threat to international peace and security.[290] Therefore, the Security Council failed to refer those countries, such as Syria, to the ICC.[291] By contrast, the Security Council has only to referred the situation in Sudan and Libya to the ICC.[292] The decision of referral has allowed the Court to exercise its jurisdiction over these two states.[293]

Altogether, it can be concluded that the ICC's jurisdiction over non-states parties based on the Security Council's referral is not UJ. Furthermore, such jurisdiction would not be considered as an appropriate alternative to UJ as a consequence of the political factors at the Security Council.

5.5: Toward International Cooperation to Exercise UJ

5.5.1: Conferring UJ on an International Criminal Court is not a Wise Solution

The creation of a new international criminal court is not a wise solution and is unnecessary for two important reasons. Firstly, previous experience clearly shows that the establishment of an international criminal court with permanent jurisdiction is a cumbersome procedure that takes years. Attempts to establish an international criminal court with permanent jurisdiction dates back to the 1920s.[294] However, no attempt was successful until the late 1990s when the ICC was established.[295] Before the ICC Statute entered into force ad hoc relied

[289] Roberto Lavalle, (n 260), 201. See also Jennifer Trahan, (n 254), 422.
[290] Rosa Aloisi, (n 272), 164-167.
[291] Jennifer Trahan, (n 254), 470. See also Manisuli Ssenyonjo, (n 207), 425-426.
[292] William A. Schabas, (n 273), 547. See also Dapo Akande, 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC', (2012) 10 Journal of International Criminal Justice 299, 305.
[293] UN Security Council, Security Council resolution 1970, (2011), U.N. Doc. S/RES/1970 (Feb. 26, 2011); UN Security Council, Security Council resolution 1593, (2005), U.N. Doc. S/RES/1593 (31 March 2005).
[294] Vespasian Pella, (n 2), 37-38.
[295] Mahnoush Arsanjani, (n 32), 22.

tribunals had been relied on to address the heinous crimes committed around the world.[296] Examples of ad hoc tribunals include the Tokyo and Nuremberg Military Tribunals, and the Yugoslavian and Rwanda's Tribunals.[297] These tribunals were established to address heinous crimes in certain countries.[298] In accordance with this historical evidence, the impression of recreating for a new international criminal court is unhelpful.

Secondly, there are legal and political obstacles that will prevent the creation of a new international court with UJ through international treaty.[299] These obstacles are the same obstacles encountered by the German and South Korean proposals for granting the ICC UJ, including the conflict with Article 34 of the VCTL and the opposition of states to granting the ICC this mandate.[300] In this matter, the establishment of any international criminal court under an international treaty and granting this court UJ would be almost impossible in the presence of Article 34 of the VCLT.[301] This is due to the fact that the establishment of an international court over all states by treaty without their consent would contradict the provisions of Article 34VCTL, let alone granting the court UJ over states that do not agree to its creation.[302] In addition, it is highly likely that powerful states would reject giving a new court any form of UJ.[303]

Regardless, there is still a mechanism through Security Council resolutions that could theoretically establish an effective international court with UJ.[304] However, such hypothesis requires that the Security Council should consider the mere commission of the crimes of universal nature a threat to international peace and security. Subsequently, the Security Council acting under chapter VII of the UN Charter, could issue a resolution to establish a new

[296] Gabriel Bottini, (n 53), 514.
[297] Eugene Kontorovich, (n 52), 184.
[298] Gabriel Bottini, (n 53), 513.
[299] Máximo Langer, (n 8), 10.
[300] Olympia Bekou and Robert Cryer, (n 36), 54.
[301] Vienna Convention on the Law of Treaties, (n 102) art 34.
[302] Louis Henkin, (n 103) 33.
[303] Gennady Esakov, (n 189), 1197. See also Olympia Bekou and Robert Cryer, (n 36), 54.
[304] Recently, Spain and Romania proposed to establish a permanent international court for terrorism by a Resolution from the Security Council acting under Chapter VII of the UN Charter. See Ignacio de la Rasilla, 'An International Terrorism Court in nuce in the Age of International Adjudication' (2017) 1 Asian Yearbook of Human Rights and Humanitarian Law, 16-18.

permanent international criminal court with UJ over the above crimes.[305] In accordance with Article 25 and Article 103 of the Charter of the United Nations, such a resolution would be legally acceptable, since the Security Council's resolutions are binding on all states and cannot be contradicted.[306]

This possibility was discussed by the ILC when the ICC statute was drafted in 1994.[307] In this matter, it was argued that "[d]ivergent views were expressed in the Commission on the relationship of the court to the United Nations. Several members of the Commission favoured the court becoming a subsidiary organ of the United Nations by way of resolutions of the Security Council and General Assembly, without the need for any treaty."[308] Even though, the ILC did not address the issue of exercising UJ by the envisioned court in the draft statute 1994, the possibility was strongly criticised by a significant number of the Commission's members who argued that it was undesirable and unrealistic at that stage.[309]

Recently, Spain and Romania proposed to establish a permanent international court for terrorism by a Resolution from the Security Council acting under Chapter VII of the UN Charter.[310] However, this proposal has not accepted due to legal and political reasons. In this regard, it was noted in Chapter 3 that the definition of terrorism is still a controversial issue, as terrorism lacks a unified international definition.[311] Equally, the decision-making mechanism within the Security Council and the role of political factors may prevent the establishment of an international court with UJ.

In fact, the idea of setting up an international criminal court by a UN Security Council resolution has been strongly criticised since the draft of 1994. Thus, setting up a new international criminal court with UJ, would be almost impossible. The opposition, after almost 26 years, focusses on the idea that firstly, the composition of the Security Council and its

[305] In fact, the SC in many instances did not consider the commission of international crimes as a threat to international peace and security, accordingly, the SC did not act under Chapter VII of the Charter. See Rosa Aloisi, (n 272), 164-167. See also Jennifer Trahan, (n 254), 470.
[306] Charter of the UN, (n 218), Art 25 and Art 103.
[307] Draft Statute for ICC, (n 34), Article 2. Relationship of the Court to the United Nations, Commentary 1, p 27.
[308] Ibid.
[309] Ibid.
[310] Ignacio de la Rasilla, (n 304), 16-18.
[311] Yearbook of the ILC 1988, (n 23), para 24, p. 84; UN Security Council, Security Council resolution 1566 (2004) [concerning threats to international peace and security caused by terrorism], 8 October 2004, S/RES/1566 (2004). See also Erin Creegan, 'A Permanent Hybrid Court for Terrorism', (2011) 26 American University International Law Review 237, 240.

voting mechanism have a significant impact on Security Council resolutions.[312] Secondly, as noted above, Security Council resolutions are political decisions rather than legal decisions.[313] Indeed, the Security Council was given absolute authority to determine that whether a situation threatens international peace and security.[314] The charter does not stipulate any legal criteria for this decision, nor does it assign any authority to oversee Security Council resolutions.[315] In fact, previous Security Council resolutions show that the mere commission of crimes of a universal nature are not considered a threat to international peace and security.[316] Therefore, it can be argued that the establishment of a permanent international criminal court with UJ through a Security Council resolution is unrealistic.

In light of the above analyses, it can be concluded that the view that UJ can be exercised through an international court is incorrect because there is no international tribunal or court that has exercised UJ. On the other hand, the establishment of a new international court with UJ, or giving UJ to the existing ICC, is difficult in the near future as a result of the aforementioned political and legal factors. Therefore, the research in the next section will discuss the international support for national courts' practice of UJ as a mechanism for the effective exercise of such jurisdiction.

5.5.2: The Practice of UJ by National Courts with the Assistance of International Institutions

As noted in the previous section, UJ has not been exercised by any international tribunal or court and it is unlikely to be exercised by them in the near future.[317] Consequently, the exercise of UJ will continue to be done by national courts.[318] In order to avoid the obstacles that faced the exercise of UJ by national courts discussed in the previous chapter, there is a need for international cooperation to exercise UJ in an efficient and impartial manner. It is

[312] Charter of the UN, (n 218), Art 27. See also Daniel Deudney and Hanns W. Maull, (n 217), 107.
[313] Jennifer Trahan, (n 254), 422.
[314] Manisuli Ssenyonjo, 'State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia', (2018) 29 Criminal Law Forum 63, 93.
[315] Jane Stromseth, David Wippman and Rosa Brooks, (n 267) 93.
[316] Rosa Aloisi, (n 272), 164-167. See also Jennifer Trahan, (n 254), 470.
[317] Gabriel Bottini, (n 53), 513.
[318] Yearbook of the ILC 1996, (n 1), 27. See also Yearbook of the ILC 1988, (n 23), para 15. See also Bernhard Graefrath, (n 16), 72.

worth mentioning that the research will focus only on the exercise of conditional UJ, which requires the presence of the accused on the territory of the state. This is because there are state practices that have demonstrated the existence of conditional UJ under international law;[319] unlike the exercise of UJ in absentia, which does not actually exist under international law.[320]

In this section, the research will discuss some proposals mentioned in previous studies for certain forms of international cooperation that can support the national courts' exercise of UJ. The research will firstly discuss a proposal by Dalila Hoover, who suggested that the exercise of UJ by national courts under ICC supervision, which is described as the Review Board proposal.[321] Secondly, a recommendation for the exercise of UJ by a hybrid court, similar to the Senegalese experiment in the Habré case.[322] As noted in the previous chapter, UJ was exercised in the Habré case via cooperation between Sengal and the African Union.[323] Thus, the exercise of UJ by such a method of international cooperation will be discussed in this section.

5.5.2.1: The Possibility of Exercising UJ by National Courts with ICC Supervision

Dalila Hoover suggested that the difficulties facing national courts when exercising UJ[324] can be avoided by giving the ICC supervision authority over the exercise of UJ by its state parties. In this matter, she argued that "Currently, the ICC judicial chambers have three divisions: The Pre- Trial Division, the Trial Division, and the Appeals Division. However, none of these bodies provide for a "pre-trial check" of a state party's claim to exercise UJ."[325] Indeed, this proposal suggested creating a new Division in the ICC judicial chambers to act as a pre-trial check. The proposed Review Board would have the authority to check the legality of exercising UJ by

[319] Rephael Ben-Ari, (n 63), 170; Roger O'Keefe, 'The Grave Breaches Regime and Universal Jurisdiction', (2009) 7 Journal of International Criminal Justice 811, 812. See also Report of the UN Secretary-General, (n 184).
[320] Separate Opinion of President Guillaume to the Judgment of 14 February 2002, available at http://www.icj-cij.org/files/case-related/121/121-20020214-JUD-01-01-EN.pdf. the Separate Opinion in case of the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v.Belgium), Judgment,Feb. 14, 2002) , available at http://www.icj-cij.org/docket/files/121/8126.pdf [hereinafter Arrest Warrant Case]. See also Pavel Caban, (n 108), 185.
[321] Dalila Hoover, (n 95), 103.
[322] Human Rights Watch, (n 164).
[323] Ibid.
[324] Gabriel Bottini, (n 53), 550.
[325] Dalila Hoover, (n 95), 102.

national court.[326] This proposal aims to establish the Review Board as Division in the ICC system to ensure the impartiality and legality of the claims of states to exercise UJ.[327] In addition, Hoover suggests that the Review Board should be part of the ICC because crimes considered by the ICC's jurisdiction have a universal nature, so the ICC has expertise in international crimes.[328]

It is worth mentioning that the Review Board proposal is limited only to granting the ICC supervisory authority over the exercise of UJ by its state parties. This means that UJ would be exercised by national courts with the ICC's help and supervision, however, it would not be extended to allowing the exercise of UJ by the ICC,[329] in contrast to the German and South Korean proposal, which aimed to allow the exercise of UJ directly by the ICC.[330]

Under the Review Board proposal, UJ is assumed to be exercised by national courts which have the right to do so only when the accused is in their territory.[331] In order to ensure the legality and impartiality of their use of UJ, it will be subject to the ICC's supervision and review.[332] Regardless, nothing under the current Rome Statute permits the above proposal, so the Rome statute would need to be amended to accommodate such a proposal.[333] The question that arises is whether the Rome Statute can be amended to implement this proposal and whether such a proposal is necessary when a Regional Hybrid Approach may be effective.

From a procedural point of view, Article 121 of the Rome statute stipulates that an amendment to the ICC statute is possible only if a two-thirds majority of states parties accept the amendment.[334] Such a proposal could face difficulties in obtaining a two-thirds approval

[326] Gabriel Bottini, (n 53), 550.
[327] Dalila Hoover, (n 95), 103.
[328] Ibid.
[329] Ibid, 103-105.
[330] As noted earlier in this chapter, the German and south Korean proposals was rejected during the Rome Conference. In fact, the most prominent criticism for the South Korean and German proposals was their contradiction with Article 34 of the VCTL, as they allowed the exercise of universal jurisdiction by the ICC over countries that did not agree to its creation. See Nicolaos Strapatsas, (n 36), 16. See also Olympia Bekou and Robert Cryer, (n 36), 53-55.
[331] Dissenting opinion of Judge van den Wyngaert) ICJ, para 57-58, p30. Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v.Belgium), Judgment, Feb. 14, 2002.
[332] International supervision over State practice of universal jurisdiction had generally proposed before the establishment of the ICC. See Yearbook of the ILC 1983, (n 30), para. 22; Yearbook of the ILC 1986, (n 30), para. 32; Yearbook of the ILC 1996, (n 1), 28.-30. See also Bernhard Graefrath, (n 16), 72,78
[333] Dalila Hoover, (n 95), 105.
[334] Rome Statute, (n 43), Art 121.

for the following reasons: firstly, the integrity of the Court has recently been challenged by African states, prompting a number of them to announce their withdrawal.[335] Africa is the largest continent in the ICC system. So far, 122 States have ratified the Statute of the ICC, of which 34 are from Africa, 18 from Asia, 27 from Latin America and the Caribbean, 18 from Eastern Europe and 25 from Western Europe & North America.[336] Accordingly, the amendment to establish the Review Board as a new division in the ICC to assess and assist states in the exercise of UJ may not be accepted by African countries due to allegations of a lack of integrity in the ICC.[337] On the other hand, the African Union recently created a new mechanism to help national courts exercise UJ through the Regional Hybrid Approach.[338] Accordingly, there seems to be no need for the Review Board proposal in light of the existence of other possible methods of international cooperation.

From the above analyses, it can be concluded that exercising UJ by national courts with the ICC supervision is not permitted under the current Rome Statute. The Review Board proposal requires amendments to the Rome Statute that could be difficult in the near future. Additionally, the Review Board proposal could be unnecessary because of the existence of other possible methods for supporting the national courts' exercising of UJ, such as the regional support.

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[335] Manisuli Ssenyonjo, (n 314), 63-65. The withdrawal from the ICC has not only been from African States, but Philippine also has recently formally withdrawn from the ICC. See ICC, ICC Statement on The Philippines' notice of withdrawal: State participation in the Rome Statute system essential to international rule of law, 20 March 2018, available at https://www.icc-cpi.int/Pages/item.aspx?name=pr1371 [accessed 23rd June 2020]. See also Jason Gutierrez, New York times, Philippines Officially Leaves the International Criminal Court, March 17, 2019, available at https://www.nytimes.com/2019/03/17/world/asia/philippines-international-criminal-court.html [accessed 23rd June 2020].

[336] See The States Parties to the Rome Statute available at https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx [accessed 3 April 2019].

[337] Manisuli Ssenyonjo, (n 314), 68-85. See also Alebachew Birhanu, 'The Relationship Between the International Criminal Court and Africa: From Cooperation to Confrontation?', (2012) 3 Bahir Dar University Law Journal 121, 125.

[338] Sarah Williams, 'The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem?', (2013) 11 Journal of International Criminal Justice 1139, 1154. See also International Crimes Database(ICD), Hissène Habré v. Republic of Senegal, 2013, available at http://www.internationalcrimesdatabase.org/Case/220 [accessed 1 April 2019]

5.5.2.2: The Hybrid Courts and the Exercise of UJ

As an alternative to ad hoc international tribunals, a new model of international justice emerged in the late 1990s, known as hybrid courts. Such courts are described as follows: "courts of mixed composition and jurisdiction, encompassing both national and international aspects, usually operating within the jurisdiction where the crimes occurred".[339] Additionally, hybrid courts have been established as a solution to transitional justice in post-conflict situations when there is insufficient domestic capacity to deal with major atrocities.[340] To date, most of the hybrid courts have been created to deal with post armed conflict or violence. For example, in Sierra Leone, Kosovo and East Timor.[341] Such courts aimed to mix the benefits of national trials, such as geographical and physical proximity to victims, and the positive impact on local state institutions,[342] with the benefits of international participation, including judges and security.[343] Furthermore, it was argued that the common features among the hybrid courts[344] including that firstly, the application of both domestic and international law.[345] Secondly, the combination of local and international staffs and judges. In this matter, it was claimed that the formal international participation to ensure the legality and impartiality of the trials.[346] Thirdly, the hybrid courts are usually located in or near the conflict-affected state.[347] Finally, these courts are usually operated under the joint supervision of the United Nations and the states concerned.[348]

Although hybrid courts may have similar procedures and functions in some respects, they do not have mandatory requirements or a specific basic model. Additionally, there is no unified model for the establishment of the hybrid courts.[349] In fact, state practice reflects that they

[339] UN Office of the High Commissioner for Human Rights (OHCHR), Rule of Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts, 2008, HR/PUB/08/2, pp. 1.
[340] Laura A. Dickinson, 'The Promise of Hybrid Courts', (2003) 97 The American Journal of International Law 297, 297.
[341] UN Office of the High Commissioner for Human Rights (OHCHR), (n 339), 3.
[342] Ibid, 35.
[343] Laura A. Dickinson, (n 340), 310.
[344] Erin Creegan, (n 311), 268-276.
[345] Laura A. Dickinson, (n 340), 295.
[346] Ibid, 307.
[347] UN Office of the High Commissioner for Human Rights (OHCHR), (n 339), 23-30.
[348] Sarah Williams, *Hybrid and Internationalized Criminal Tribunals: Selected Jurisdictional Issues*, (1st edn, Hart Publishing, 2012) 249.
[349] Malcolm Shaw, (n 118), 417.

have been established in one of the four following ways: firstly, under the administration of the United Nations, such as the East Timor Tribunal and Kosovo specialist chambers.[350] Secondly, through a bilateral agreement between a state and the UN, such as the Sierra Leone Tribunal and Extraordinary Chambers in the Courts of Cambodia.[351] Thirdly, as a domestic court with international elements. In this form, states choose to establish courts as domestic courts with international participation. These courts are originally domestic, but they use international law and some international staff to assist and monitor trials, such as the Bosnian War Crimes Chamber and the Iraqi High Tribunal.[352] Fourthly, the establishment of the hybrid courts through a Security Council resolution. The Special Tribunal for Lebanon is the only hybrid tribunal established under a state request by a Security Council resolution.[353] It should be noted that all the above hybrid courts are considered part of the national judicial system of the founding states.[354] In addition, the international involvement by the UN or other international institution is considered to be a support for the national judicial system.[355]

Regarding the exercise UJ, none of the aforementioned hybrid courts relied on the principle of UJ as the legal basis for its creation.[356] Rather, they all relied on the traditional links of jurisdiction, namely territorial and national jurisdiction. As mentioned above, most of the hybrid courts were established by the conflict-affected state and the UN.[357] The crimes heard in all the hybrid courts were committed in the state that established the hybrid courts.[358]

[350] Amnesty International, Indonesia and Timor-Leste: Amnesty International & Judicial System Monitoring Programme. Justice for Timor-Leste: The Way Forward, 1 April 2004, ASA 21/006/2004, See also Alberto Costi, Hybrid Tribunals as a Valid Alternative to International Tribunals for the Prosecution of International Crimes, (August 24, 2005). 3rd Annual Victoria University Symposium on Human Rights, Wellington, p.12. Available at SSRN: https://ssrn.com/abstract=2738183

[351] Sarah M.H. Nouwen, 'Hybrid courts' The hybrid category of a new type of international crimes courts', (2006) 2 Utrecht Law Review 190, 194-196.

[352] International Crimes Database(ICD), Domestic Courts (Bosnian War Crimes Chamber, International Crimes Division Uganda, International Crimes Tribunal Bangladesh and Iraqi High Tribunal) available at http://www.internationalcrimesdatabase.org/Courts/Domestic [accessed 1 April 2019].

[353] UN Security Council, Security Council resolution 1644, (2005), U.N. Doc. S/RES/1644 (15 December 2005). See also Malcolm Shaw, (n 118), 427-728.

[354] Sarah M.H. Nouwen, (n 351), 209.

[355] Frédéric Mégrett, 'In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice', (2005) 38 Cornell International Law Journal 725, 747.

[356]Ibid.

[357] Sarah M.H. Nouwen, (n 351), 203.

[358] Ibid, 209.

Additionally, those accused of committing these crimes were either citizens of these countries or citizens of neighbouring countries.[359]

Accordingly, it can be argued that the hybrid courts including East Timor, Kosovo, Sierra Leone, Cambodia, Bosnia, Iraq and Lebanon did not support the exercise UJ.[360] Thus, can the hybrid court system be used to support states in the exercise of UJ? In this regard, as mentioned above, the research will focus only on the exercise of conditional UJ, which requires the presence of the accused on the territory of the State because there are state practices that have demonstrated the existence of conditional UJ under international law.[361] The second question is that if the United Nations does not support states to exercise UJ through hybrid tribunals, can another international institution do so?

First of all, it was argued that the establishment of hybrid courts to support a state's exercise of UJ is theoretically possible[362] because the hybrid court is not necessarily a creation of a new court but a national court with international support.[363] Regarding international involvement, the UN does not have a monopoly on the establishment of hybrid courts, other international or regional bodies can also contribute to establishing the hybrid court. The establishment of hybrid courts could be through a bilateral agreement between a state and another international organization or between a number of states.[364] Senegal and the African Union established the Extraordinary African Chambers as a hybrid court.[365] It is worth mentioning that the background of the Habré case and the legal dispute between Senegal and Belgium is

[359] For example, the former Liberian president was convicted by Sierra Leone Tribunals for his contribution to crimes committed in the neighbouring state of his country, Sierra Leone. See Robert Cryer, (n 8), 518.

[360] Chandra Lekha Sriram, 'Globalising Justice: From Universal Jurisdiction to Mixed Tribunals', (2004) 22 Netherlands Quarterly of Human Rights 6, 32. See also Sarah Williams, (n 338), 1139–1160.

[361] Rephael Ben-Ari, (n 63), 170; Roger O'Keefe, (n 319), 811-812. See also Report of the UN Secretary-General, (n 184).

[362] Sarah Williams, (n 338), 1139–1160.

[363] Statute of the Extraordinary African Chambers, (Unofficial translation by Human Rights Watch) September 2, 2013, art 2 available at https://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers [accessed 1 April 2019]. See also Sofie A. E. Høgestøl, 'The Habré Judgment at the Extraordinary African Chambers: A Singular Victory in the Fight Against Impunity', (2016) 34 Nordic Journal of Human Rights 147, 151-152.

[364] Sarah M.H. Nouwen, (n 351), 210-211. In fact, she argued that "*However, it is not self-evident that the UN holds the monopoly over these objectives. Apart from in enforcement situations, States or other international organizations can also assist in rebuilding justice systems".*

[365] Human Rights Watch, (n 175). See also Sarah Williams, (n 338), 1145. See also International Crimes Database(ICD), Hybrid Courts (Special Panels and Serious Crimes Unit in East-Timor, Regulation 64 Panels in the Courts of Kosovo, Special Court for Sierra Leone, Extraordinary Chambers in the Courts of Cambodia, Special Tribunal for Lebanon and Extraordinary African Chambers) available at http://www.internationalcrimesdatabase.org/Courts/Hybrid [accessed 1 April 2019].

described below. Then, the research will discuss the Senegalese and the AU experience to demonstrate the possibility of using the hybrid court to support the practice of UJ.

5.5.2.2.1: The Background of the Habré Case and the Legal Dispute between Senegal and Belgium

The case of former Chadian President Habré had significant impact on the exercise of UJ.[366] Habré ruled Chad between 1982 and 1990, before taking refuge in Senegal in 1990.[367] It was claimed that during this period, thousands of Chadians were tortured and killed.[368] Accordingly, in February 2002, a Senegalese court convicted Habré of crimes against humanity, but the Dakar Court of Appeal dismissed the conviction five months later on the grounds that the charges were not included in the Senegalese Penal Code.[369] Between November and December 2000, Chadian nationals and a Belgian citizen of Chadian origin sued Habré in the Belgian courts. In accordance with UJ, Belgium issued an international arrest warrant against Habré in September 2005.[370] However, Senegal refused to extradite him to Belgium.[371] It is worth mentioning that Belgium has continued to demand the extradition of Habré under UJ despite amendments to Belgian law because the criminal proceedings in this case were initiated before the amendments came into force on 5th August 2003.[372]

In July 2006, the African Union asked Senegal to try Habré for torture, war crimes and crimes against humanity.[373] On 21st February 2007, Senegal amended its criminal law to include crimes of genocide, war crimes and crimes against humanity as subject of UJ.[374] Despite this

[366] FIDH and REDRESS, Universal Jurisdiction Trial Strategies: Focus on victims and witnesses, A report on the Conference held in Brussels, 9-11 November 2009, p11 Available at <https://www.fidh.org/IMG/pdf/Universal_Jurisdiction_Nov2010.pdf> (Accessed 15/6/2017).

[367] REDRESS, FIDH, ECCHR and FIBGAR, Make Way for Justice 3: Universal Jurisdiction Annual Review 2017, UJAR, p 39. Available at <https://trialinternational.org/wp-content/uploads/2017/03/UJAR-MEP_A4_012.pdf> Accessed (29/12/2017).

[368] FIDH and REDRESS, (n 366), p. 32. See also Valentina Spiga, 'Non-retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga', (2011) 9 Journal of International Criminal Justice 5, 10.

[369] REDRESS, FIDH, ECCHR and FIBGAR, (n 367), p 39.

[370] Human Rights Watch, (n 175).

[371] Human Rights Watch, Belgium/Senegal: World Court to Hear Habré Trial Dispute, 16 February 2012, available at http://www.refworld.org/docid/4f3e58542.html [accessed 26 July 2018].

[372] Separate Opinion of Judge Abraham, para 31-40. Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal). Available at <https://www.icj-cij.org/files/case-related/144/144-20120720-JUD-01-02-EN.pdf> (accessed on 27/9/2018).

[373] Amnesty International, Universal Jurisdiction: The Duty Of States To Enact And Enforce Legislation: Chapter 2: The Evolution Of The Practice Of Universal Jurisdiction 31 August 2001, IOR 53/004/2001, p70-71. Available at<https://www.amnesty.org/en/documents/document/?indexNumber=IOR53%2F004%2F2001&language=en> (Accessed on 9/11/2017)

[374] Human Rights Watch, (n 175).

legal amendment, Senegal has not taken any concrete steps to try Habré.[375] Consequently, Belgium sued Senegal in the International Court of Justice, on 19th February 2009. Here, Belgium was seeking to urge Senegal to try Habré or extradite him to the Belgian authorities.[376] Accordingly, on 20th July 2012, the International Court of Justice (ICJ) ordered Senegal to try Habré or extradite him to Belgium.[377] The Court explained that Senegal had not made serious efforts to try Habré. In a binding decision, the court ordered Senegal to act under the United Nations Convention against Torture treaty they had ratified.[378] The treaty obliges the ratifying states to extradite anyone on their territory accused of responsibility for torture or bring them to trial.[379] Consequently, Senegal and the African Union in 2012 decided to set up a special tribunal to try Habré. The trial began on July 20th, 2015.[380] The Special Tribunal on issued its judgment on 30th May 2016, condemning Habre for torture, war crimes and crimes against humanity and sentenced him to life imprisonment.[381]

5.5.2.2.2: Senegal and the African Union as a Model for the Exercise of UJ by the Hybrid Court

The proposal to set up a hybrid tribunal for the Habré trial was launched in 2006 by Human Rights Watch. It was proposed to establish a hybrid court between Senegal and Belgium to exercise UJ over the Habré case.[382] In addition, Tanaz Moghadam stressed that the practice of UJ in this manner between Senegal and Belgium was the best option in the case of Habré.[383] However, instead of the previous proposals, Senegal preferred to establish the hybrid tribunal with the AU because the Committee of Eminent African Jurists recommended that the trial should be carried out by an African country.[384] Therefore, the Extraordinary African Chambers

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[375] Tamsin Paige, 'Piracy and Universal Jurisdiction', (2013) 12 Macquarie Law Journal 131, 150.
[376] Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) Request for the indication of provisional measures, Summary 2009/3.
[377] Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, p. 422. See also Human Rights Watch, (n 371); Máximo Langer, (n 8), 32.
[378] Valentina Spiga, (n 368), 18.
[379] Ibid.
[380] Human Rights Watch, (n 164).
[381] Report of the UN Secretary-General, The Scope and Application of the Principle of Universal Jurisdiction, Seventy-second session, UN. Doc. No A/72/112 (22 June 2017) par 27, p. 6.
[382] Human Rights Watch, Submission to the Committee of Eminent African Jurists: Options for Hissène Habré to Face Justice, April 2006, p.20, available at https://www.hrw.org/legacy/backgrounder/africa/chad1205/chad1205.pdf [accessed 1 April 2019].
[383] Tanaz Moghadam, 'Revitalizing universal jurisdiction: lessons from hybrid tribunals applied to the case of Hissene Habre', (2007) 39 Columbia Human Rights Law Review 471, 508.
[384] It also proposed the establishment of ad hoc African court to try Habré. See Committee of Eminent African Jurists, Report of the Committee of Eminent African Jurists on the Case of Hissene Habre, January 2006, p.4-7,

were established by an agreement signed between Senegal and the AU on 22 August 2012,[385] with the aim of supporting Senegal to exercise UJ.[386]

As mentioned, Senegal incorporated the principle of UJ into its law under Law No. 5 of 2007.[387] The presence of Habré on the Senegalese territory legally supported Senegal's use of UJ over Habré for the crimes that were committed in Chad.[388] Therefore, the Extraordinary African Chambers was established within the Senegalese justice system to support the exercise of UJ over Habré.[389] In this regard, the Statute of the Extraordinary African Chambers supported Senegal's use of UJ under Article 3:

> The Extraordinary African Chambers shall have the power to prosecute and try the person or persons most responsible for crimes and serious violations of international law, customary international law and international conventions ratified by Chad, committed in the territory of Chad during the period from 7 June 1982 to 1 December 1990.[390]

In order to harmonise Senegalese legislation with international standards, the Statute of the Extraordinary African Chambers under Article 5,6,7 and 8 defined international crimes, including genocide, crimes against humanity, war crimes and torture.[391] In addition, Articles 9 and 10 provided that no statutory limitations are applied in Habré case. Accordingly, the Extraordinary African Chambers began the trial in 2015, and issued a judgment convicting Habre for war crimes and crimes against humanity; he was sentenced to life imprisonment on 30th May 2016.

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available at https://www.peacepalacelibrary.nl/ebooks/files/habreCEJA_Repor0506.pdf [accessed 1 April 2019].

[385] Report of the International Law Commission, 66th session (2014), Doc. No. A/69/10, para 35, p. 156.

[386] Statute of the Extraordinary African Chambers, (n 363). See also Roland Adjovi, 'The Agreement on the Establishment of the Extraordinary African Chambers within the Senegalese Judicial System Between the Government of the Republic of Senegal and the African Union and the Statute of the Chambers', (2013) 52 International Legal Materials 1020, 1030.

[387] Law No. 2007-05 of 12 February 2007 amending the Code of Criminal Procedure concerning the implementation of the Treaty of Rome establishing the International Criminal Court. Senegal Criminal and penal law. Adopted on: 2007-02-12. Published on: Official Journal, 2007-03-10, No. 6332. ISN: SEN-2007-L-85317. Available in French at <http://ilo.ch/dyn/natlex/natlex4.detailp_lang=en&p_isn=85317> (Accessed 20/7/2018).

[388] Committee of Eminent African Jurists, Report of the Committee of Eminent African Jurists on the Case of Hissene Habre, January 2006, p.4, available at https://www.peacepalacelibrary.nl/ebooks/files/habreCEJA_Repor0506.pdf [accessed 1 April 2019].

[389] Report of the UN Secretary-General, (n 381), para 27, p6.

[390] Statute of the Extraordinary African Chambers, (n 363), art 3.

[391] Ibid, art 5,6,7 and 8.

It is worth mentioning that the establishment of the Extraordinary African Chambers was not a creation of a new court, rather it was an arrangement of support by the AU for the Senegalese judicial system to exercise UJ.[392] In this matter, Article 2 of the Statute of the Extraordinary African Chambers considers these chambers part of Senegal's judicial system.[393] Additionally, most of the judges in the Extraordinary African Chambers were from Senegal.[394] In fact, Article 2 classify these chambers to the following categories: The Extraordinary African Investigative Chamber, The Extraordinary African Indicting Chamber, The Extraordinary African Trial Chamber and The Extraordinary African Appeals Chamber.[395] Regarding the judges' nationality, Article 11 provides that all the judges are from Senegal except the presidents of the Trial Chamber and the Appeals Chamber[396] to ensure the legality and impartiality of the Extraordinary African chambers. Additionally, the judges of all the Chambers were chosen by the State of Senegal, with the exception of alternate judges who were appointed by the Chairperson of the Commission of the African Union in accordance with the proposal of the Senegalese Minister of Justice.[397]

In light of the above analysis, it can be concluded that the establishment of hybrid courts to support states' exercise of UJ is possible.[398] This is because a hybrid court is not necessarily a new court but international support for the national court of a state, which can exercise UJ when the accused is present in its territory.[399] However, in practice, there are two requirements that should be available, including the desire of the state to exercise UJ through the hybrid court.[400] In addition, it may be desirable for the approval of an international institution that will contribute to and support the national court in the exercise of UJ.[401] In this matter, there is no single model for the establishment of hybrid courts. As mentioned above, the States practices have showed different models for the establishment of the hybrid

[392] FIDH, Universal Jurisdiction Annual Review 2016, Make Way For Justice 2: p.37, available at https://www.fidh.org/IMG/pdf/ujar_2016.pdf [accessed 1 April 2019].
[393] Statute of the Extraordinary African Chambers, (363), art 2.
[394] Roland Adjovi, (n 386), 1021.
[395] Statute of the Extraordinary African Chambers, (n 363), art 2(a), (b), (c) & (d).
[396] Ibid, art 11.
[397] Ibid. See also Sofie A. E. Høgestøl, (n 363), 154.
[398] Sarah Williams, (n 338), 1139–1160.
[399] Statute of the Extraordinary African Chambers, (n 363), art 2. See also Sofie A. E. Høgestøl, (n 363),151-152.
[400] It was argued that there are obvious tendencies among states in favour of the restrictive or conditional exercise of universal jurisdiction. See Report of the UN Secretary-General, (n 184).
[401] Sarah M.H. Nouwen, (n 351), 210-211.

courts.[402] The United Nations does not have a monopoly on establishing hybrid courts and another international or regional bodies can also contribute.[403] Thus, states can choose the appropriate method of establishing a hybrid court to exercise UJ.[404]

5.6: Summary

By tracking the international efforts to establish an international criminal court, which lasted about 80 years, it can be noticed that UJ has not been exercised by any international tribunal or court.[405] In fact, all proposals to grant an international court or tribunal UJ have failed. During the discussion of the Genocide Convention, the issue of exercising UJ through an international criminal court was discussed.[406] However, a significant number of states voted against such jurisdiction by an international tribunal.[407] Secondly, during the discussion of the DCCAPSM, the ILC addressed the issue of exercising UJ by international criminal courts or national courts.[408] In this regard, they held that the use of UJ by national courts should be a basis for this Code.[409] They argued that granting UJ to an international tribunal would not be an effective mechanism to combat offences against the peace and security of mankind.[410] Thirdly, at the Rome conference on the Establishment of an International Criminal Court, the issue of exercising UJ through an international court was proposed by Germany and South Korea.[411] However, the proposals were rejected, and the ICC was established in 1998, without having UJ.[412]

In accordance with this historical evidence, it can be concluded that firstly, the argument that UJ can be exercised through an international court is incorrect,[413] since UJ is always exercised by national courts when the legal conditions are met.[414] In fact there is no legal condition that requires that UJ should be exercised only by national courts. However, there has been no

[402] Sarah M.H. Nouwen, (n 351), 209.
[403] Ibid, 210-211.
[404] Sofie A. E. Høgestøl, (n 363), 151-152.
[405] Gabriel Bottini, (n 53), 513.
[406] UNGA Resolution 260, (n 12).
[407] Report of the Sixth Committee, (n 18). See also Bernhard Graefrath, (n 16), 69.
[408] Yearbook of the ILC 1996, (n 1), 27. See also Yearbook of the ILC 1988, (n 23), para 15.
[409] Bernhard Graefrath, (n 16), 72.
[410] Ibid, 78. See also Yearbook of the ILC 1983, (n 30), para. 22; Yearbook of the ILC 1986, (n 30), para. 32.
[411] Nicolaos Strapatsas, (n 36), 16. See also Olympia Bekou and Robert Cryer, (n 36), 53-55.
[412] Ademola Abass, (n 37), 371-372.
[413] Report of the UN Secretary-General, (n 10), para 25, p.8.
[414] Gabriel Bottini, (n 53), 513.

practice of UJ by an international court.[415] Additionally, there are a number of legal and political obstacles that prevented the ICC from being granted UJ. These obstacles including the conflict with Article 34 of the VCTL and the opposition of veto-holding states.[416]

Accordingly, it can be argued that the establishment of a new international court to exercise UJ is almost impossible in the near future. This is due to the fact that the same political and legal obstacles that faced proposals to give the ICC UJ could face any proposal for a new court. Therefore, as an alternative to the exercise of UJ by international courts, international efforts should focus on supporting state to exercise of UJ through the hybrid court system. in this matter, the establishment of hybrid courts to support the states' use of UJ is possible.[417] This is because the hybrid court is not a creation of a new court, rather it is international support for a national court, which can exercise UJ when the accused is present in its territory.[418]

By contrast, it is worth mentioning that despite the importance of hybrid courts and their legal support for exercising UJ, the hybrid courts system could not solve the critical issue of UJ. As mentioned in previous chapters, this issue involves a lack of uniform legal standards for exercising UJ under the provisions of international law. This problem is due to the fact that the principle of UJ over international crimes is still developing and there are no clear international texts regulating its exercise.[419] Therefore, there is urgent need to establish international standards for the exercise of UJ. In this matter, international legal standards should be established and provided at an international document as a draft article issued by the ILC. Accordingly, the research in next chapter will discuss the possibility of codifying the principle of UJ.

[415] Ibid.
[416] Olympia Bekou and Robert Cryer, (n 36), 54.
[417] Sarah Williams, (n 338), 1139–1160.
[418] Statute of the Extraordinary African Chambers, (n 363), art 2. See also Sofie A. E. Høgestøl, (n 363),151-152.
[419] Mahmoud Cherif Bassiouni, (n 5), 82.

Chapter Six: The Aspirations for the Codification of Universal Jurisdiction (UJ)

6.1: Introduction

As noted in the conclusion of the previous chapters, owing to the uncertainties in the exercise of UJ that have strained international relations among States, the view was expressed that there was an urgent need for the International Law Commission (ILC) to codify UJ.[1] In fact, the principle of UJ has played a significant role in filling the impunity gap. However, there are some problems surrounding the exercise of UJ. For example, the potential clash between the implementation of UJ and the principle of state sovereignty and diplomatic immunity. The issues that arise are a result of the lack of uniform regulations for exercising UJ. It is also worth mentioning that UJ derives its primary international legitimacy from customary international law.[2] Though the principle of UJ has been recognized implicitly in many international conventions, none of these conventions governs the principle of UJ comprehensively.[3]

Accordingly, these circumstances led a number of countries to demand that the United Nations (UN) determine UJ and the scope of its practice.[4] Hence, the scope and definition of

[1] Report of the International Law Commission on the work of its seventieth session, 30 April–1 June and 2 July–10 August 2018 At its 1st meeting, on 1 May 2018, the Planning Group decided to reconvene the Working Group on the long-term programme of work, with Mr. Mahmoud D. Hmoud as Chair. The Chair of the Working Group presented an oral report on the work of the Working Group at the session to the Planning Group, at its 2nd meeting, on 30 July 2018. The Planning Group took note of the oral report. The Commission, on the recommendation of the Working Group, decided to recommend the inclusion of the following topics in the long-term programme of work of the Commission: (a) Universal criminal jurisdiction; and (b) Sea-level rise in relation to international law.

[2] Robert Cryer, *An Introduction to International Criminal Law and Procedure*, (2nd ed. Cambridge University Press, 2010) 54.

[3] Report of the Sixth Committee, 64th session on "the scope and application of the principle of universal jurisdiction", UN. Doc. No. A/62/425 (16 December 2009); UNGA Resolution, 64th Session, Agenda 84, Resolution adopted by the General Assembly on 16 December 2009 [on the report of the Sixth Committee (A/64/452)], No. A/RES/64/117, (15 January 2010). See also, Petra Baumruk, *The Still evolving Principle of Universal Jurisdiction*, (PhD Thesis Charles University in Prague, 2015), 63. See also Sienho Yee, 'Universal Jurisdiction: Concept, Logic, and Reality', (2011) 10 Chinese Journal of International Law 503, 504.

[4] Report of the Sixth Committee, (n 3); UNGA Resolution (n 3). See also United Nations, 72nd Session: The scope and application of the principle of universal jurisdiction (Agenda item 85), http://www.un.org/en/ga/sixth/72/universal_jurisdiction.shtml (accessed Dec 4, 2019).

UJ has been considered by the Sixth Committee of UN General Assembly (UNGA) since 2009.[5] However, these issues have not been settled yet, though they have been discussed widely since 2009. Consequently, it is clear that there is still no uniform international instrument regulating the exercise of UJ. In light of this, the main aim of this chapter is to examine how the exercise of UJ could be improved internationally. Additionally, it aims to find out whether the codification of UJ is necessary and desirable.

To do this, the research will first analyse previous efforts to codify the principle of UJ. In this regard, international and regional efforts will be highlighted as the work of the UN Sixth Committee since 2009; or AU-EU Expert Report on the Principle of UJ. In addition, the research will focus on some of the previous proposals on clarifying the universal mandate, such as Princeton's principles on UJ. The research will evaluate these proposals in order to take lessons from them for possible future codification of UJ by the ILC.

Secondly, the research will examine the position of the ILC on the codification of UJ. The aim of this point is to clarify the position of the ILC on UJ and why it has not been discussed extensively so far. Thirdly, the research will examine the more recent decision by the ILC to include the topic of 'UJ' in the ILC's Long-term Programme of Work.[6] It is worth considering that in 1996 the ILC set legal criteria for placing any topic on their long-term programme of work, which include the following:

> *(a) The topic should reflect the needs of States in respect of the progressive development and codification of international law; (b) The topic should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification; (c) The topic is concrete and feasible for progressive development and codification.*[7]

Hence, this section will examine whether UJ would satisfy the criteria for adding the topics to the Long-Term Programme of Work. Following this, the research will discuss the desired and potential outcomes from the codification of UJ.

[5] Report of the sixth Committee, 67th session on ''the scope and application of the principle of universal jurisdiction'', UN. Doc .No. A/67/472 (20 November 2012).
[6] Report of the ILC, on the Work of its 70th Session' (2018) UN. Doc. No A/73/10, para 37, p 9.
[7] Yearbook of the ILC 1997, vol. II (Part Two), Doc. No. A/CN.4/SER.A/1997/Add.l (Part 2)), para. 238.

6.2: Lessons Learned from the Previous Efforts to Codify UJ

The movement towards the codification of international law has a long history and includes ad hoc conferences, such as the Vienna Conference 1814-1815, London Naval Conference 1908-1909.[8] Private national and international institutions had a prominent role in understanding and codifying international law, such as the International Law Association and the Institute of International Law, both established in 1873, and Harvard Research in International Law, issued 1929-1939.[9] Furthermore, there were international efforts by the League of Nations to encourage the codification of international law, but these efforts were not a great success.[10] With the inception of the UN, the Charter of the UN, in Article 13 (1) (a), gave considerable attention to the idea of codifying and supporting the development of international law.[11] Consequently, the codification movement of international law increased significantly after the establishment of the UN.[12]

Regarding the codification of UJ did not receive much attention until the early 2000s.[13] As mentioned in the previous chapters, the principle of UJ is based on international custom as a legal basis.[14] In this matter, it was observed that Harvard's research in 1935 referred to the principle of UJ over the crime of piracy as one of the principles recognised under international

[8] United Nations Documents on the Development and Codification of International Law, prepared for the Committee on the Progressive Development of International Law and Its Codification, (including Historical Survey of Development of International Law and Its Codification by International Conferences (A/AC.10/5 of 29 April 1947)), American Journal of International Law, Suppl., vol. 41, No. 4, 1947, p. 32-33.

[9] Ibid, p. 35. The International Law Association (ILA), was founded in (Brussels, 1873); The Institute of International Law (IIL), was founded (Ghent Town Hall in Belgium, on 8 September 1873); the Harvard Research in International Law, the American Journal of International Law, between (1929 -1939).

[10] League of Nations, Assembly resolution of 25 September 1931: Records of the Twelfth Assembly, Plenary Meetings, p. 135.

[11] Charter of the United Nations, 24 October 1945, 1 UNTS XVI, art 13 (1) (a), art 18; UNGA Resolution 94 (I) of 11 December 1946 (Progressive development of international law and its codification); Report of the Committee on the Progressive Development of International Law and its Codification (A/AC.10/51, reissued as A/331), 17 June 1947.

[12] R. Y. Jennings, 'The Progressive Development of International Law and its Codification', (1947) 24 British Yearbook of International Law 301, 301.

[13] International Law Association, Final Report on the Exercise of Universal Jurisdiction In Respect of Gross Human Rights Offences, prepared by the Committee on International Human Rights Law and Practice, submitted to (London Conference, 2000). [hereinafter Report of the ILA].

[14] Institute of International Law, Resolution on Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes, Krakow Session - 2005, para 2. [hereinafter Institute of International Law Resolution]. See also Claus Kreb, 'Universal Jurisdiction over International Crimes and the Institute de Droit international', (2006) 4 Journal of International Criminal Justice 561, 571. See also Malcolm N Shaw, *International Law*, (6th edn. Cambridge University Press, 2008) 668.

law.[15] However, it did not refer to other crimes such as war crimes and genocide, which apparently became subject to UJ after the Second World War.[16] This is due to the fact that the Harvard Project was years before the expansion of the scope of UJ, which was developed further after World War II.[17]

In addition, the delay in codifying UJ is due to the fact that the practice of UJ over international crimes such as war crimes and genocide went through a period of lethargy spanning nearly four decades, which lasted from Eichmann's trial in 1961 to the Pinochet case in 1998.[18] Consequently, there was little noticeable interest in codifying UJ during that period. In the late 1990s and early 2000s, however, international criminal law witnessed a remarkable development as a number of international tribunals and courts were established and a large number of countries adopted UJ as a means of combating impunity for the most serious international crimes.[19]

Nevertheless, the increase in adopting UJ was accompanied by issues of problematic use in the exercise of such a jurisdiction because of the ambiguity that surrounded its definition and scope. In this matter, it was observed that some countries have authorized its practice without any conditions, and some countries have expanded its scope to include certain national crimes. Additionally, due to vagueness in the definition and issues connected to the principle of universality, when this principle has been applied, it has at times led to tensions

[15] Harvard Research in International Law, Draft Convention on Jurisdiction with Respect to Crime (1935) 29 The American Journal of International Law, art 9, 10, p 440.

[16] ibid

[17] Report of the ILA, (n 13), p 3. See also Willard B. Cowles, 'Universal Jurisdiction over War Crimes', (1945) 33 California Law Review 177, 213. it was claimed that the term of UJ over war crimes was coined for the first time by Cowles in 1945. In fact, he used this term to justify that war crimes are similar to piracy and brigandism, so every state has an interest in punishing the perpetrators on behalf of the international community. See 3.2.1: The Definition of universal jurisdiction.

[18] Attorney-General of Israel v Adolf Eichmann (District Court, Jerusalem) Case No. 40/61, 15 January 1961, 36 ILR 5. Attorney-General of Israel v Adolf Eichmann (Supreme Court of Israel) Case No. 336/61, 29 May 1962, 36 ILR**;** R. v. Bow St. Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 1), 3 WLR 1456 (H.L.(E.) 1998); Christine M. Chinkin, United House of Lords: Regina v. Bow Street Stipendiary Magistrate, exparte Pinochet Ugarte (No. 3), 93 AM. J. INT'L L. 703, 704 (1999); R. v. Bow St. Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3), 2 WLR 827 (H.L.(E.) 1999)**;** Mahmoud Cherif Bassiouni, 'Universal jurisdiction for international crimes: historical perspectives and contemporary practice', (2001) 42 Virginia Journal of International Law 81, 87. See also Human Rights Watch, The Extradition of General Augusto Pinochet, (October 14, 1999), available at http://www.hrw.org/news/1999/10/14/extradition-general-augusto-pinochet [accessed 6-12-2019].

[19] See chapter four at 4.2.1.1: The adoption of UJ expressly under national legislation. William A. Schabas, *An Introduction to the International Criminal Court*, (2edn, Cambridge University Press, 2004) 20; Bruce Broomhall, 'The International Criminal Court: A Checklist for National Implementation', (1999) 13 quater, Nouvelles etudes pénales 113.

between states, which can be seen currently.[20] It may be expected that conflict frequently arises at the level of diplomacy, politics and law between states, whether bilaterally, regionally or internationally. Such an instance was seen in the case of the *Arrest Warrant of 11 April 2000* heard by the International Court of Justice, which considered whether an arrest warrant was valid that had been issued by Belgium for the arrest of Abdoulaye Yerodia, foreign minister for the Congo, based on allegations of crimes against humanity and war crimes.[21] The ICJ concluded that Belgium violated its international obligation to respect the immunity of a minister by issuing the arrest warrant.[22] The reason for this view is that there is no international rule allowing national courts to exercise their jurisdiction over persons with diplomatic immunity.[23]

The interest in codifying and clarifying UJ has increased since the early 2000s and a number of the private legal institutions have submitted explanatory reports on UJ. This has included the International Law Association (ILA) (2000),[24] Institute of International Law (2005),[25] and The Princeton Project on UJ (2001).[26] It is worth noting the importance of these legal writings as they are considered a subsidiary source of international law. In this matter, Article 38(1)(d) of the ICJ Statute considers that the ''teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law''.[27] Therefore, this section will discuss these efforts to clarify and codify UJ. The research will evaluate these proposals to take lessons from them for any possible future codification of UJ by the ILC.

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[20] Gabriel Bottini, 'Universal jurisdiction after the creation of the International Criminal Court', (2004) 36 New York University Journal of International Law and Politics 503, 556. See also Olympia Bekou and Robert Cryer, 'The International Criminal Court and Universal Jurisdiction: A Close Encounter?', (2007) 56 International and Comparative Law Quarterly 49, 56.

[21] Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), International Court of Justice (ICJ), 14 February 2002, [hereinafter Arrest Warrant Case].

[22] Ariel zemach, 'Reconciling Universal Jurisdiction with Equality Before the Law', (2011) 47 Texas International Law Journal 143, 159.

[23] International Law Commission, sixty-fourth session Geneva, Preliminary report on the immunity of State officials from foreign criminal jurisdiction, Prepared by Special Rapporteur Ms. Concepción Escobar Hernández, Doc. No. A/CN.4/654, 31 May 2012, para 9 at p.4.

[24] Report of the ILA, (n 13).

[25] The Institute of International Law Resolution, (n 14).

[26] The Princeton Principles on Universal Jurisdiction, (2001) 28 Princeton University Program in Law and Public Affairs. [hereinafter, The Princeton Principles on Universal Jurisdiction]. The Permanent Mission of Canada and the Netherlands to the United Nations sent a copy of these principles to the Secretary-General of the United Nations for circulation under agenda item 164 of the United Nations at its fifty-sixth session United Nations General Assembly, 4 December 2001, A/56/677.

[27] Statute of the International Court of Justice, United Nations, 18 April 1946, Art 38 paragraph 1 (d) available at: http://www.refworld.org/docid/3deb4b9c0.html [accessed 28 August 2018].

6.2.1: International Law Association (ILA) - Report on UJ (2000)

The ILA, at its 66th session in 1994 in Buenos Aires, decided to include the question of UJ in its agenda for future sessions by the Committee on Human Rights Law and Practice. Accordingly, at its 67th session, the Committee decided to select Prof. Menno Kamminga as Rapporteur. The final report of the Commission was issued in 2000 at the ILA 69th session in London.[28] In this matter, the report consisted of 29 pages, including 22 pages that discuss the Commission's findings on UJ. Additionally, the final seven pages of the report are followed by an appendix showing the position of 13 countries in UJ up to 2000. These states are Australia, Austria, Belgium, Canada, Denmark, France, Germany, Netherlands, Senegal, Spain, Switzerland, United Kingdom and the United States.[29] The Report comments that most of the aforementioned countries have exercised UJ in the event that the accused are present in their territory.[30] It is worth highlighting that the countries mentioned in the report were limited to western countries and did not include any African, Asian, or Latin American countries. Therefore, it can be criticised for not comprehensively analysing state practice in different regions.

Generally, the outputs of the ILA's work have taken the form of academic reports that have discussed UJ by relying on a *lex lata* point of view, as well as proposing some ideas based on *de lege ferenda*. Based on a *lex lata* point of view, UJ is defined by this report as criminal jurisdiction that can be exercised over the accused of committing the most serious crimes. In this regard, the report stressed that UJ could be exercised over a specific number of crimes known as 'gross human rights offences. The report defined 'gross human rights offences' as

> *… shorthand for certain serious violations of international humanitarian law and international human rights law that qualify as crimes under international law and that are of such gravity as to set them out as deserving special attention, inter alia, through their being subjected to universal jurisdiction.*[31]

In this matter, the report concluded that the gross human rights offences that are subject to UJ include war crimes, genocide, crimes against humanity and torture.[32] It is important to

[28] Report of the ILA, (n 13).
[29] Ibid, 22-29.
[30] Ibid, 23.
[31] Ibid, 3.
[32] Ibid, 4-9.

note that the report was careful to identify crimes that enjoy international consensus as being the subject of UJ. By contrast, the historical crimes that are subject of UJ, namely piracy and slavery, are not mentioned.[33] In this matter, this dissertation claims that there is no reason not to mention piracy and slavery as crimes subject to UJ, especially since the practice of states and doctrinal opinions support them as a subject of UJ. For example, the Institute of International Law, at its meeting in Cambridge in 1931, recommended that states exercise UJ over a list of crimes including piracy and slavery.[34] Additionally, Harvard's research in 1935 referred to the principle of UJ over the crime of piracy as one of the principles recognised under international law.[35] So, there is no reason not to mention piracy and slavery as crimes within UJ under the ILA report.

On the other hand, the report mentioned that the exercise of UJ does not require any link between the crime, accused and the forum state, with the exception of the condition of the presence of the accused in the territory of the State that will exercise UJ. As described by the report *"[T]he only connection between the crime and the prosecuting state that may be required is the physical presence of the alleged offender within the jurisdiction of that state".*[36] Accordingly, the report supports the position that UJ is not absolute but is conditional on the presence of the accused in the State to exercise such jurisdiction.[37] This point of the report reflects *lex lata* on UJ.

[33] Christian Tomuschat and Jean-Marc Thouvenin eds, *The Fundamental Rules of The International Legal Order Jus Cogens And Obligations Erga Omnes*, (1st edn, Martinus Nijhoff Publishers, 2006) 269. Report of the International Law Commission on the work of its Fifteenth Session, 6 July 1063, Official Records of the General Assembly, Eighteenth Session, Supplement (A/5509), Extract from the Yearbook of the International Law Commission: 1963, vol. II A/CN.4/SER.A/1963/ADD.1, at 199. Mahmoud Cherif Bassiouni, (n 18) 114.

[34] Resolution on the Conflict of Penal Laws with Respect to Competence, adopted by the Institute of International Law at Cambridge, 31 July 1931, Art. 5.(English translation by Amnesty International) See Amnesty International, Universal Jurisdiction: The Duty Of States To Enact And Enforce Legislation: Chapter 2: The Evolution Of The Practice Of Universal Jurisdiction 31 August 2001, Ior 53/004/2001 availabal at <https://www.amnesty.org/en/documents/document/?indexNumber=IOR53%2F004%2F2001&language=en> Accessed on 9/11/2017

[35] Harvard Research in International Law, (n 15) art 9, 10, p 440.

[36] Report of the ILA, (n 13), 2.

[37] See also Arrest Warrant Case, (n 21), Dissenting opinion of judge van den wyngaert) ICJ, para 57-58, p30; Separate Opinion of President Guillaume to the Judgment of 14 February 2002, available at http://www.icj-cij.org/files/case-related/121/121-20020214-JUD-01-01-EN.pdf. See also Roger O'Keefe, 'The Grave Breaches Regime and Universal Jurisdiction', (2009) 7 Journal of International Criminal Justice 811, 814. See also Maximo Langer, 'Universal Jurisdiction is Not Disappearing: The Shift from 'Global Enforcer' to 'No Safe Haven' Universal Jurisdiction', (2015) 13 Journal of International Criminal Justice 245, 254-255.

As mentioned in chapter four, most states confirm that the exercise of UJ is conditional upon the presence of the accused in the territory of the forum State.[38] Thus, the report in this point is consistent with the findings of this dissertation.

Additionally, the report discussed a number of obstacles to the exercise of UJ. Such as the absence of national legislation authorising the exercise of UJ. In this regard, the report mentioned that the absence of national legislation has prevented the exercise of UJ over the most serious crimes. Therefore, States should adopt the necessary legislation, which is consistent with the provisions of international law stating that perpetrators of international crimes should be prosecuted, and so close the gap of impunity.[39] This is analysed in chapter four and so the findings of this dissertation are compatible with the ILA report in relation to this point.[40]

By contrast, the report discussed the issue of immunities as another obstacle to the exercise of UJ. In this matter, the report suggests that the immunity of current officials should not be considered an impediment to the exercise of UJ.[41] This point of view was expressed *de lege ferenda* because the states practice do not support such view. Indeed, this recommendation has been proposed as analogous with the jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal For Rwanda (ICTR), which permit the exercise of the international criminal jurisdiction of these Tribunals over current officials. In addition, the recommendation was also based on the legislation of countries, such as Belgium, which had authorised the exercise of UJ over the holders of diplomatic immunities.[42] However, the aforementioned recommendation could be criticised for the following reasons: firstly, as mentioned in Chapter 4, States that had attempted to

[38] Report of the UN Secretary-General, The scope and application of the principle of universal jurisdiction, Sixty-sixth session, UN. Doc. No. A/66/93 (20 June 2011), para 63-100, at 13-20. See also Olympia Bekou and Robert Cryer, (n 20) 56.
[39] Report of the ILA, (n 13), 10-12.
[40] Javor et al., Order of Tribunal de grande instance de Paris, 6 May 1994; upheld on appeal by the Paris Court of Appeal, 24 October 1994 and by the Court of Cassation, Criminal Chamber, on 26 March 1996; Dupaquier et al., Order of Tribunal de grande instance de Paris, 23 February 1995. See also Rephael Ben-Ari, 'Universal jurisdiction: chronicle of a death foretold?' (2015) 43 Denver Journal of International Law and Policy 165, 169-170. See also Amnesty International, 'Universal Jurisdiction Preliminary Survey of Legislation around the World – 2012 Update', Index: IOR 53/019/2012, October 2012, p7.
[41] Report of the ILA, (n 13), 14.
[42] Report of the ILA, (n 13), 14. See also Loi relative à la répression des infractions graves de droit international humanitaire, 10 February 1999, Moniteur Belge, 23 March 1999. English translation in 38 I. L. M (1999) 918, Art. 5(3).

override immunity in the exercise of UJ, including Belgium, Spain and the UK, failed in their attempts.[43] Due to the fact that there is no legal rule under customary or conventional international law, national courts of foreign states are able to exercise criminal jurisdiction over the holders of diplomatic immunities. This view was confirmed by the ICJ in the Arrest Warrant Case in 2002.[44] Consequently, the above-mentioned states faced legal problems as a result of the contradiction between the exercise of UJ and the duty to respect diplomatic immunity.[45] Thus, they amended their laws to reflect that the holders of diplomatic immunities, such as heads of state, prime ministers and foreign ministers, during the performance of their functions enjoy temporary procedural immunity from the exercise of UJ by foreign states.[46]

Secondly, the recommendation can be criticised because of the difference between UJ exercised by national courts and the international criminal jurisdiction of international tribunals. As mentioned in Chapter 5, there is a difference between UJ when exercised by national courts and the international criminal jurisdiction that is exercised by international courts and tribunals, especially with regard to immunities in that, unlike the international criminal jurisdiction, UJ cannot be exercised over the holders of diplomatic immunities.[47] This is due to the absence of any written international rule or an international custom that permits the criminal jurisdiction of national courts over current diplomatic immunities. This point of view was confirmed by the ICJ in the arrest warrant case between Belgium and Congo, which stated that the diplomatic immunity of current officials should not be overridden if the trial is

[43] The Act of 16 June 1993 concerning the punishment of grave breaches of the Geneva Conventions of 12 August 1949 and their Additional Protocols I and II of 18 June 1977 (Official Journal of 05.08.1993, at 17751-17755); Ley Orgánica del Poder Judicial 1985, Organic Law of the Judicial Power 1985 (as amended Judiciary Law 2009); International Criminal Court Act 2001, UK Public General Acts2001 c. 17. Available online http://www.legislation.gov.uk/ukpga/2001/17/part/5 as amended by the Coroners and Justice Act of 2009, UK Public General Acts2009 c. 25 Available online http://www.legislation.gov.uk/ukpga/2009/25/contents

[44] Arrest Warrant Case, (n 21) pp 70.

[45] Gabriel Bottini, (n 20) 507.

[46] International Law Commission, sixty-eighth session Geneva, Fifth report on the immunity of State officials from foreign criminal jurisdiction, Prepared by Special Rapporteur Concepción Escobar Hernández, Doc. No. A/CN.4/701, 14 June 2016, para 66 at p.33; 2003 Criminal Code, New section I (a) of the Criminal Code (L. 5 August 2003) Article 136, unofficial translation in English by ICRC; Organic Law no. 5/2010 amending Organic Law 10/1995, of November 23, of the Criminal Code. Official State Gazette (Separata), 2010-06-23, no. 152, p. 54811-54883; Police Reform and Social Responsibility Act 2011, UK Public General Acts 2011 c. 13.

[47] LIU Daqun, 'Has Non-Immunity for Heads of State Become a Rule of Customary International Law?', in Morten Bergsmo and Ling Yan (eds), *State Sovereignty and International Criminal Law,* (Beijing: Torkel Opsahl Academic EPublisher, 2012), 63.

taken before a national court.[48] Recently, this point of view has been confirmed by the International Criminal Court (ICC) in its decision in the case of Sudanese President Omar Hassan al-Bashir. In this matter, the Appeals Chamber of the ICC confirmed that it is accepted under customary international law that in the context of relations between States ''immunity prevents one State from exercising its criminal jurisdiction over the Head of State of another State''.[49] On the other hand, the court affirmed that this fact is limited to the jurisdiction of national courts and does not apply to the jurisdiction of international court.[50]

Consequently, the report can be criticised for suggesting that national courts may exercise UJ without respecting diplomatic immunities, instead relying on the international criminal jurisdiction of international tribunals. Indeed, unlike international criminal jurisdiction, UJ cannot be exercised over the holders of diplomatic immunity.[51] This is due to two main reasons, the first is that the exercise of international criminal jurisdiction over the holders of diplomatic immunity is an exception from a general provision expressly provided in the international instruments.[52] Secondly, international criminal jurisdiction is always exercised by an international institution.[53] Thus, the possibility of misuse in exercising criminal jurisdiction is less likely as this jurisdiction is exercised by an international institution. Accordingly, it can be argued that the exercise of UJ by a national court does not detract from the need to respect diplomatic immunity.

It can therefore be concluded that the ILA's report included a good explanation of the concept of UJ but could be criticized for not being accurate with regard to immunity. In this regard,

[48] Arrest Warrant Case, (n 21), Immunity and inviolability of an incumbent Foreign Minister in general (paras. 47-55) p 18-20. See also See also Gabriel Bottini, (n 20) 507. See also, Dalila Hoover, 'Universal jurisdiction not so universal: time to delegate to the International Criminal Court?', (2011) 8 Eyes on the International Criminal 73, 97.

[49] ICC, The Appeals Chamber, Situation in Darfur, Sudan in the case of the Prosecutor V. Omar Hassan Ahmad Al-Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal, No. ICC-02/05-01/09 OA2, 6 May 2019, para 101, at 52-53.

[50] Ibid.

[51] JIA Bingbing, 'Immunity for State Officials from Foreign Jurisdiction for International Crimes', in Morten Bergsmo and Ling Yan (eds), *State Sovereignty and International Criminal Law*, (Beijing: Torkel Opsahl Academic EPublisher, 2012) 75-77.

[52] Statute for the (ICTY) International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. S/RES/827 (1993) (amended 1998), reprinted in 32 I.L.M. 1192 (1993), art 7 [hereinafter ICTY Statute]; Statute for the (ICTR) International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1598 (1994), art6 [hereinafter ICTR Statute]; Rome Statute of the International Criminal Court art. 1, July 17, 1998, 2187 U.N.T.S. 90 (amended 2010), art 27 [hereinafter Rome Statute].

[53] Gabriel Bottini, (n 20) 513.

the ILA's report relied on the Belgian legislation that was authorising the exercise of UJ over the holders of diplomatic immunities when the report was issued.[54] However, Belgium, in 2003, amended its law and avoided allowing such jurisdiction over the holders of diplomatic immunities, particularly after the ICJ in 2002 had confirmed that the diplomatic immunity of current officials should not be overridden if the trial is taken before a national court.[55] It is clear that the ILA's report had been issued in 2000 before the ICJ issued its ruling in the Belgium case and the subsequent amendment took place in Belgian law in 2003.[56]

6.2.2: The Princeton Project on UJ (2001)

The Princeton Principles were prepared in 2001 by a group of international criminal law and human rights specialists and was sponsored by Princeton University and other of human rights organisations.[57] Unlike the ILA Report on UJ which took the form of an academic report, the Princeton Principles took the form of principles or a draft treaty. The Princeton Principles involves fourteen general points that provide guidance to the ongoing evolution of UJ. In general, the Princeton Principles, like ILA report, rely on *lex lata*, and some principles have expressed the *de lege ferenda* point of view. In this matter, this dissertation will give a summary of the fourteen principles and discuss some of the points of development in the intervening 19 years following their publication.

The first principle includes a definition of UJ and a statement of its most fundamental elements. It states that

> *universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.*[58]

As mentioned in Chapter 3, this definition is general and does not include important elements about UJ, such as whether it is conditional or absolute criminal jurisdiction or whether it is

[54] Report of the ILA, (n 13), 14.
[55] Arrest Warrant Case, (n 21), Immunity and inviolability of an incumbent Foreign Minister in general (paras. 47-55) p 18-20. See also Gabriel Bottini, (n 20) 507; Dalila Hoover, (n 48) 97; Mark A. Summers, 'The International Court of Justice's Decision in Congo v. Belgium: How Has It Affected the Development of a Principle of Universal Jurisdiction That Would Obligate All States to Prosecute War Criminals', (2003) 21 Boston University International Law Journal 64, 68.
[56] Roger O'Keefe, (n 37) 814; Maximo Langer, (n 37) 254-255.
[57] The Princeton Principles on Universal Jurisdiction, (n 26).
[58] The Princeton Principles on Universal Jurisdiction, (n 26) principle 1(1), p 28.

primary criminal jurisdiction or it is exercised in a subsidiarity manner.[59] In this matter, the research in Chapter 3 suggested that UJ should be defined as follow: UJ is the exclusive criminal jurisdiction that can be exercised over accused of committing a certain number of international crimes by national courts of any State on whose territory the accused is present, exclusively in the absence of an effective jurisdiction that was supposed to be exercised.[60]

The second and third paragraphs of the first principle referred to the issue of the presence of the accused in the territory of States to exercise UJ.[61] The text of the second paragraph stipulated that the presence of the accused is a condition for trial but did not consider it to be a condition for the exercise of UJ in general terms. The exercise of criminal jurisdiction is not limited to the trial only but includes other criminal proceedings such as the issue of the arrest warrant.[62] In this regard, the Princeton Principles allowed the commencement of trial proceedings and issues arrest warrants even if the accused is not present in the territory of the State. This can be observed from the text of the third paragraph, which states that a State may issue arrest warrants even if the accused is not present in its territory.[63] Accordingly, the texts of the Princeton Principles does not require the presence of the accused as a condition for the exercise of UJ. In fact, such a point of view contradicts the practice of the States discussed in Chapter 4 of the research, which shows that most countries in the world now require the presence of the accused as a prerequisite for the exercise of UJ.[64]

It should be noted that the participants in the Princeton Project were aware of this condition but preferred not to require it in anticipation of it and hoped that such a requirement would be abolished, so their point of view was expressed *de lege ferenda*.[65] However, the practical reality after 19 years suggests otherwise, as most countries in the world that had authorised

[59] Luc Reydams, The application of universal jurisdiction in the fight against impunity, the European Parliament's Policy Department, Directorate-General for External Policies, (2016) QA-01-16-324-EN-N (pdf), at 1. See also Dalila Hoover, (n 48) 82. See also Gabriel Bottini, (n 20) 511.
[60] Anthony J. Colangelo, 'Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law', (2007) 48 Harvard International Law Journal 121, 130.
[61] The Princeton Principles on Universal Jurisdiction, (n 26) principles 1(2), p 28.
[62] Report of the International Law Commission, 58th session, Doc. No. A/61/10, 1 Aug 2006, Annex A, Immunity of State officials from foreign criminal jurisdiction, by (Mr. Roman A. Kolodkin), p. 446. See also Arrest Warrant Case, (n 21), (paras. 63-64) p 23.
[63] The Princeton Principles on Universal Jurisdiction, (n 26) principle 1(3), p 28-29, Explanatory comments p 44. See also Gabriel Bottini, (n 20)516.
[64] Olympia Bekou and Robert Cryer, (n 20) 56.
[65] The Princeton Principles on Universal Jurisdiction, Explanatory comments, p 43.

the exercise of UJ in absentia , such as Belgium and Spain, amended their laws.[66] Accordingly, it can be argued that the above-mentioned paragraph needs to be reviewed in order to conform to the practical reality that the accused must be present as a condition for the exercise of UJ.

The fourth and fifth paragraph of the first principle stipulates that the need to ensure fair trial and respect international law provisions should be observed in the exercise of UJ.[67] For a similar purpose, Principle 10 authorises the refusal to extradite the accused to protect them from the death penalty and other cruel and inhuman punishments.[68] These principles express *lex lata* point of view as a significant number of international conventions support such a view as does states' practice.

The second principle provides for crimes subject to the exercise of UJ. Here, the Princeton Principles define a number of offences including piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide and torture.[69] The dissertation argues that the Princeton Principles were realistic when the exercise of UJ was limited to the aforementioned crimes with the exception of the crimes against peace.[70] This is due to the fact that the enumerated offences are considered to be some of the most serious international crimes and their commission is a violation of peremptory norms under international law. In addition, State practice has also shown that UJ can be applied only over a limited number of crimes, which include these offences, with the exception of the crimes against peace. Regarding crimes against peace, it was a subject of controversy among the participants in the Princeton project[71] due to the fact that there is no international custom that supports the exercise of UJ over crimes against peace.[72]

There is no basis for classifying crimes against peace or aggression as a subject of UJ because there is no practice of states to support it. Indeed, it has been demonstrated that the

[66] Roger O'Keefe, (n 37) 814; Maximo Langer, (n 37) 254-255.
[67] The Princeton Principles on Universal Jurisdiction, (n 26) principles 1 (3), (4), p 29.
[68] Ibid, principle 10, p 34.
[69] Ibid, principle 2, p 29.
[70] Mahmoud Cherif Bassiouni, (n 18) 114.
[71] The Princeton Principles on Universal Jurisdiction, (n 26) Explanatory comments, p 47.
[72] Draft Code of Crimes against the Peace and Security of Mankind, International Law Commission, forty-eighth session, Doc. No. A/CN4/L532 (8 July 1996) Art 8. Also available at Yearbook of the ILC, 1996, vol. II (Part Two). A/CN 4/SER A/1996/Add1, p 27. [hereinafter DCCAPSM]

prosecution of such crimes is often carried out by an international tribunal, as was the case in the Nuremberg and Tokyo international tribunals.[73] It is worth emphasising that crimes against peace have been covered by the jurisdiction of the ICC, which became known as the crime of aggression, defined in 2010 in Kampala.[74] However, there is no international custom that supports the exercise of UJ by national courts over the crime of aggression. This point of view has been stressed since 1996 in the Draft Code of Crimes against the Peace and Security of Mankind (DCCAPSM) as follows: Article 16 provides that crimes of aggression shall be considered as crimes included in this Draft because of the seriousness of the crime on all mankind and its significant impact on international peace and security.[75] On the other hand, Article 8, declared that all crimes in this Draft are subject to UJ with the exception of crimes of aggression, which are often the subject of international criminal jurisdiction or territorial jurisdiction but are not subject to UJ.[76] In this matter, it was noted that ''Jurisdiction over the crime set out in article 16 shall rest with an international criminal court. However, a State referred to in article 16 is not precluded from trying its nationals for the crime set out in that article''.[77]

In fact, there is no state practice that supports the exercise of UJ over crimes of aggression. Since the Nuremberg and Tokyo courts, the perpetrators of aggression crimes have been held accountable by international courts.[78] Additionally, the crime of aggression threatens international peace and security, and it is usually difficult to hold perpetrators accountable by national courts because of the breadth of their scope and their military, political and legal consequences. Consequently, most countries are reluctant to exercise UJ over the crime of aggression by national courts. In light of this, this dissertation does not favour including the crime of aggression under UJ. It can be argued that for the time being, it would be wiser to

[73] Charter of the International Military Tribunal, 8th of Aug. 1945, art. 6(a), 82 U.N.T.S. 284, 59 Stat. 1546 [hereinafter Nuremberg Charter], annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8th of Aug. 1945, 82 U.N.T.S. 279, 59 Stat. 1544.

[74] Rome Statute, (n 52) art 5, 122, and 123. at Review Conference of the Rome Statute of the ICC in Kampala 2010, the crime of aggression had defined and came into force later in 2017. See also Marina Mancini, A Brand New Definition for the Crime of Aggression: The Kampala Outcome (2012) 81Nordic Journal of International Law, 227, 231.

[75] DCCAPSM, (n 72) art 16, p 42.

[76] Ibid, art 8, p27.

[77] Ibid, art 8, p27.

[78] United Nations, Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), 8 August 1945, 82 U.N.T.C. 280, [hereinafter London Agreement] Nuremberg Charter, (Charter of the International Military Tribunal) (1945) Annex to the London Agreement of 8 August 1945; Tokyo Charter, International Military Tribunal for the Far East Charter (IMTFE Charter) Special proclamation by the Supreme Commander for the Allied Powers at Tokyo January 19, 1946.

focus on the need to exercise the principle with respect to crimes to which it clearly applies under current international criminal law rather than on an expanded list of crimes.[79]

Principle 3 states that UJ should be exercised by States even if their legislation lacks a provision for UJ.[80] This point of view was expressed *de lege ferenda* because the State's practice does not support such a view. In practice, it was observed that the absence of national legislation providing for UJ can be an obstacle to the exercise of UJ. As mentioned in Chapter 4, in the case of *Javor et autres*, for example, the French judiciary was unable to exercise UJ in the absence of national legislation permitting its exercise.[81] Therefore, States should adopt the necessary legislation to authorise the exercise of UJ.

In order to avoid this obstacle, Principle 11 of the Princeton Principles provides that states should adopt UJ into their national legislation.[82] Furthermore, Principle 12 states that UJ should be included in future and existing international treaties on international crimes set out in Principle 2.[83] In this matter, the Princeton Principles arguably performed strongly when they followed Principle 3 to 12, which all aim at strengthening the exercise of UJ and encouraging States and the international community as a whole to adopt UJ as a means of filling the impunity gap.

It is worth mentioning that there are some detailed issues regarding the exercise of UJ over holders of diplomatic immunities. In this matter, Principle 5 states that immunity does not exempt perpetrators from criminal accountability and does not commute punishment.[84] At the same time, Principle 5 does not explicitly specify whether it was permissible to exercise UJ over holders of diplomatic immunities while in office, or whether there was a procedural immunity that ended once they left office.

[79] Report of the ILA, (n 13), 8.
[80] The Princeton Principles on Universal Jurisdiction, (n 26) principles 3, p 30.
[81] Javor et al., Order of Tribunal de grande instance de Paris, (n 40). See also Human Rights Watch, Universal Jurisdiction in Europe. The State of the Art, June 2006, Human Rights Watch Vol18, NO. 5(D), at 55. Available at: https://www.refworld.org/docid/48fda4872.html [accessed 7 August 2019]
[82] The Princeton Principles on Universal Jurisdiction, (n 26) principle 11, p 34.
[83] Ibid, principle 12, p 35.
[84] Ibid, principle 5, p 31.

However, by reading the explanatory comments of the Princeton principles, it can be observed that current immunity holders have procedural immunity from the exercise of UJ. In this matter, it was mentioned that

> None of these statutes addresses the issue of procedural immunity. Customary international law, however, is quite clear on the subject: heads of state enjoy unqualified "act of state" immunity during their term of office. Similarly, diplomats accredited to a host state enjoy unqualified ex officio immunity during the performance of their official duties.[85]

Accordingly, it can be observed that the exercise of UJ over current holders of diplomatic immunities is not permitted, but immunity is not an impediment to the exercise of UJ in the future after the accused holders of diplomatic immunities leave their posts.[86] For example, as mentioned in Chapter 4, UJ was exercised in the case of the former Chilean President, Pinochet, and the case of former Chadian President Habré.[87] In Chapter 4 it was concluded that immunity is not granted to a person *per se* but to his or her status as representative of the State to conduct the duties entrusted to them.[88] Thus, UJ shall not be exercised over persons who have diplomatic immunity as official representatives of their State unless the State waives the right of immunity.[89] This provision shall not apply to the former representatives of their States. In this matter, it was described that high-ranking officials, after leaving office, could be subjected to criminal jurisdiction by foreign national courts.[90] Hence, it can be noticed that diplomatic immunity temporarily precludes the exercise of criminal jurisdiction in all its forms by foreign national courts.[91] However, once the accused is discharged from office as the representative of a State, there will be no diplomatic immunity that may prevent the exercise of criminal jurisdiction.[92]

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[85] Ibid, Explanatory comments, p 50.

[86] See the Pinochet case R. v. Bow St. Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 1), 3 WLR 1456 (H.L.(E.) 1998); Christine M. Chinkin, United House of Lords: Regina v. Bow Street Stipendiary Magistrate, exparte Pinochet Ugarte (No. 3), 93 AM. J. INT'L L. 703, 704 (1999); R. v. Bow St. Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3), 2 WLR 827 (H.L.(E.) 1999);

[87] Ibid. See also Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) judgment, International Court of Justice (ICJ) Reports 2012, p. 422.

[88] See Arrest Warrant Case in Summaries of Judgments, Advisory Opinions and Orders of The ICJ (1997-2002), Publications ST/LEG/SER.F/1/Add.2, United Nations • New York, 2003, Merits of the case (paras. 45-71), p. 212.

[89] Ibid. See also International Law Commission, (n 23), para 9 at p.4.

[90] Ilias Bantekas and Susan Nash, *International Criminal Law*, (2nd edn, Cavendish Publishing Limited, 2003) 170-172.

[91] Jana Panakova, 'Law and politics of universal jurisdiction', (2011) 3 Amsterdam law forum 49, 57.

[92] Arrest Warrant Case, (n 21), (paras. 61) p 22.

Another significant point is Principle 8 on the Resolution of Competing National Jurisdictions. in this matter, the Princeton Principles do not provide that UJ should be exercised in a subsidiary manner.[93] Principle 8 lists some general standards regarding the connection between the requesting state and the crime, the alleged perpetrator, or the victim that can be used in the event of a dispute over jurisdiction. However, it does not stipulate that UJ should be applied in a subsidiary manner.[94]

By contrast, the research argues that based on States' practice, UJ should be implemented in a subsidiary manner,[95] which means that UJ will be exercised only if the State in which the crimes are committed or the State in which the accused are national is unwilling or unable to prosecute the accused.[96] This is due to the fact that when international crimes are committed, priority is given to criminal jurisdiction based on traditional grounds such as territorial jurisdiction and national jurisdiction.[97] Accordingly, UJ is allowed to be exercised particularly in the absence of an effective traditional criminal jurisdiction that should be exercised.[98] It is worth highlighting that this point of view has been put forward and emphasised by a significant number of the participants at the Princeton Project, but in the end it was decided not to rank jurisdictional claims. In this matter, it has been noted that:

> Although it was decided not to rank jurisdictional claims, the Principles do not deny that some traditional jurisdictional claims will often be especially weighty. For example, the exercise of territorial jurisdiction will often also satisfy several of the other factors enumerated in Principle 8, such as the convenience to the parties and witnesses, as well as the availability of evidence.*[99]*

Consequently, the research considers that it would have been better if the Princeton Project had provided more directly that UJ should be exercised in a subsidiary manner. The research point of view is consistent with the practice of the states mentioned in Chapter 4, which demonstrated that significant numbers of states emphasised that UJ should be residual,

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[93] The Princeton Principles on Universal Jurisdiction, (n 26) principle 8, p 32.
[94] ibid.
[95] ZHU Lijiang, 'Universal Jurisdiction Before the United Nations General Assembly: Seeking Common Understanding under International Law', in Morten Bergsmo and Ling Yan (eds), *State Sovereignty and International Criminal Law*, (Beijing: Torkel Opsahl Academic EPublisher, 2012) 217.
[96] Report of the UN Secretary-General, (n 38) para 155. See also Luc Reydams, (n 59) 7.
[97] Mari Takeuchi, *Modalities of the Exercise of Universal Jurisdiction in International Law*, (PhD Thesis University of Glasgow 2014) 142.
[98] Petra Baumruk, (n 3) 122.
[99] The Princeton Principles on Universal Jurisdiction, (n 26) Explanatory comments, p 53.

complementary or subsidiary to the criminal jurisdiction of other States. This includes jurisdiction of the State whose national is a suspect of the crimes concerned and territorial jurisdiction of the State where the crimes concerned are committed.[100]

The Princeton Project has also included a number of general provisions in international criminal law which represent *lex lata*, such as Principle 4, which provides the obligation of States to support accountability and the need to prosecute or extradite accused persons through cooperation between States to exercise UJ.[101] Principle 6 provides for no limitation period in international crimes.[102] Principle 7 states that amnesty is generally incompatible with the State's obligation to prevent impunity and that such a principle should be avoided.[103] Furthermore, Principle 9 provides the principle of double jeopardy, meaning someone may not be prosecuted for the same crimes twice.[104] Finally, the Princeton Principles concluded with Principle 14, which calls on states to settle their disputes over jurisdiction by peaceful means, most notably by resorting to the International Court of Justice.[105]

It is worth noting that the Princeton Principles were simply presented rather than positioned as proposals for codifying UJ. In this matter, Principle 13 encourages States to adopt the Princeton Principles when exercising or interpreting UJ.[106] Generally, it can be concluded that the Princeton Principles included explanatory principles and guidance on UJ. In fact, these principles seek to give legitimacy and greater coherence to the exercise of UJ. They aim to encourage greater accountability of perpetrators of serious crimes under international law. Thus, these Principles are an important contribution to defining the scope and concept of UJ. It is a pioneering initiative whose texts could be used in the future as a guide to codify UJ. However, it should be noted that some texts need to be reconsidered, especially Principle 1, which relates to definition and does not require the presence of the accused. As well as Principle 8, which avoids stating that UJ should be implemented in a subsidiary manner. Thus,

[100] Sixth Committee, Summary Record of the 12th meeting A/C.6/64/SR.12 and Summary Record of the 13th meeting A/C.6/64/SR.13, General Assembly, Sixty-fourth session 25 November 2009. See also Sixth Committee, Summary Record of the 10th meeting 2010, A/C.6/65/SR.10 and Sixth Committee, Summary Record of the 11th meeting, A/C.6/65/SR.11, General Assembly, Sixty-fifth session, 14 January 2011. See also ZHU Lijiang, (n 95) 217.
[101] The Princeton Principles on Universal Jurisdiction, (n 26) principle 4, p 30.
[102] Ibid, principle 6, p 31.
[103] Ibid, principle 7, p 31.
[104] Ibid, principle 9, p 33.
[105] Ibid, principle 14, p 36.
[106] Ibid, principle 13, p 36.

it can be stressed that the Princeton Principles "merely provides guidance and it has not grown to have substantive influence on the development of UJ, although it has provided some directions to courts invoking UJ".[107]

6.2.3: The Cairo-Arusha Principles on UJ (2002)

The Cairo-Arusha Principles on UJ were the outcome of two expert meetings convened by Africa Legal Aid (AFLA) in 2001 in Cairo and in 2002 in Arusha to discuss the African perspective on UJ.[108] Thus, it was called "the voice of Africa in universal jurisdiction of international crimes".[109] It is worth noting that it is an expression of AFLA organization's point of view, not of the African Union. Indeed, AFLA is a non-governmental organization (NGO) that was established in Maastricht in 1995 to address issues involving the political culture and contemporary legal of the African continent exclusively.[110] Therefore, the dissertation does not support its description as "the voice of Africa". Regardless of this, the Cairo Principles have received considerable international attention and recognition. Judge Van den Wyngaert cited the Cairo principles in his dissenting opinion for the ICJ decision 2002 to emphasise the existence of regional and academic studies supporting the international recognition of UJ.[111]

Like the Princeton Principles, the Cairo Principles took the form of principles or draft treaty, however, the Cairo Principles represent *de lege ferenda* points of view more than the Princeton Principles. The Cairo Principles suggest a number of things that are not supported by state practice, such as expanding the scope of UJ over ordinary crimes like plunder and gross misappropriation of public resources. Indeed, the Cairo Principles involve fifteen principles on UJ. These fifteen principles could be classified as follows: the first four principles focus on determining the scope of UJ.[112] Principles 5 and 6 contain general provisions emphasising the obligation of States to prosecute those accused of committing international crimes. Principle 7 stresses the importance of paying attention to the victims of sexual

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[107] Petra Baumruk, (n 3) 62.

[108] Cairo-Arusha Principles on Universal Jurisdiction in respect of Gross Human Rights Offences: An African Perspective, Africa legal aid (AFLA), 2002. [hereinafter, Cairo Principles]

[109] Evelyn A. Ankumah, 'The Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offenses: An African Perspective, Proceedings of the Annual Meeting', (2004) 98 American Society of International Law 238.

[110] Africa Legal Aid (AFLA), founded on 21st October 1995, The Hague, Netherlands. Available at http://www.africalegalaid.com/about-us/

[111] Arrest Warrant Case, (n 21), Dissenting opinion of judge van den wyngaert ICJ, para 27, 46, 57.

[112] Cairo Principles, (n 108).

assaults. Principle 8 stresses the need to avoid selective policies in the exercise of UJ. Principles 9-11 focus on the necessity of international cooperation to exercise UJ. Similarly, principles 12 and 13 focus on the right to a fair trial and the need to protect witnesses, victims and the accused. Finally, Articles 14 to 19 included general provisions on the need to prosecute the perpetrators of committing gross human rights offences. In this matter, it was confirmed that amnesties, Refugee status and the use of alternative forms of justice should not be an obstacle to the exercise of UJ. `

However, the Cairo Principles could be criticised for lacking a definition of UJ and its scope. In this matter, it was observed that the Cairo Principles did not provide any definition of UJ. In addition, the first four Principles focused on determining the scope of UJ. However, these four articles are arguably ambiguous. The first one states that UJ applies to gross human rights violations in times of peace and war.[113] This can be criticised because it only uses the term 'gross human rights offences' and does not specify the nature of these crimes. What is more, the third and fourth Principles emphasise that the scope of UJ is not limited to the most serious crimes, but may extend to other crimes with negative economic, social or cultural consequences.[114] Acts of plunder and gross misappropriation of public resources are mentioned under Principle 4 as an example of such gross human rights offences, and recommends such crimes should be subject to UJ. [115] Thus, the Cairo Principles reflect the *de lege ferend*a point of view because there is no State practice that supports such a view, unlike the ILA Report on UJ mentioned above that precisely defined gross human rights offences and limited them to war crimes, genocide, crimes against humanity and torture.[116]

Accordingly, the dissertation argues that the texts in the Cairo Principles may be misinterpreted to include a large number of human rights violations. This would be a problem because it would expand the scope of UJ over ordinary crimes, which may eventually lead to an increase in disputes over UJ, As mentioned in Chapter 3, UJ can be exercised over a certain number of crimes that threaten international peace and security and constitute a violation of peremptory norms of international law such as war crime, genocide and crimes against humanity. By contrast, the Cairo Principles exaggerate the scope of crimes that fall under UJ.

[113] Cairo Principles, (n 108) principle 1.
[114] Cairo Principles, (n 108) principle 3.
[115] Cairo Principles, (n 108) principle 4.
[116] Report of the ILA, (n 13), 4-9.

For the time being, in order to narrow the conflict gap and to reach a consensus view on UJ, it would be pragmatic to focus on the need to exercise the principle over crimes to which it clearly applies under current international criminal law rather than expanding the list of crimes.[117]

The second Principle was ambiguous because it used obscure legal terms under international law when stating that UJ can be exercised over natural persons and other legal entities.[118] This is obscure because it aims to allow criminal liability for other legal entities. Indeed, such a provision is unacceptable in international law because criminal liability under international criminal law is currently limited to natural persons and does not extend to other legal entities.[119] This point of view was highlighted by the ILC when discussing the topic of State responsibility for Internationally Wrongful Acts as there is no international practice that validates the claim that states can be the subject of criminal responsibility.[120]

Additionally, the above view was confirmed at the Rome Conference to establish the International Criminal Court. In this regard, it was observed that some States, such as France, suggested extending the scope of international criminal liability to other legal entities, but such a proposal was strongly opposed by participating delegations.[121] It was therefore confirmed that international criminal liability was limited to natural persons and did not extend to other legal entities.[122] Recently, the issue of criminal liability on legal entities was raised before the Special Court of Lebanon.[123] In spite of the interactions that took place in

[117] Report of the ILA, (n 13). P8.
[118] Cairo Principles, (n 108) principle 2.
[119] Report of the International Law Commission, Fiftieth Session [1998] Doc. (A/53/10) para 248-250, at 119 - 121.
[120] Ibid.
[121] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June - 17 July 1998, A/CONF.183/13 (Vol.II), p 133. Proposal submitted by France (A/CONF. 183/C.1/L3).
[122] The Law Of Nations, Corporate criminal liability under international law, March 13, 2018. https://lawofnationsblog.com/2018/03/13/corporate-criminal-liability-international-law/ (Accessed 22/11/2019). See also NautaDutilh Law Firm, New Rules on the Criminal Liability of Legal Entities https://www.lexology.com/library/detail.aspx?g=bd6dac87-4cae-4f11-876b-17ac14875c29 (Accessed 22/11/2019)
[123] Special Tribunal for Lebanon (Contempt Judge), Decision on Motion challenging jurisdiction and on request for leave to amend the order in lieu of an indictment, New TV S.A.L. and Ms Khayat (STL-14-05/PT/CJ), 24 July 2014.

the case, it was decided that criminal liability for legal entities is excluded.[124] The judge's opinion is due to the absence of a provision in the Statute of the Tribunal that allows for the criminal prosecution of legal persons and to the absence of such a provision in international law.[125] Consequently, it can be suggested that the issue of criminal liability of legal persons is still a controversial issue, and it is not wise to include it in the topic of UJ, which is the subject of discussion.

Overall, it can be concluded that the Cairo Principles were an attempt by Africa Legal Aid (AFLA) to address the concept of UJ. It is an expression of this organisation's point of view, not of the African Union. Thus, the research does not support its description as "the voice of Africa in UJ of international crimes".[126] The principles include vague provisions such as the use of the term the 'gross human rights violations' to express crimes under UJ. It also extends the criminal responsibility to include other legal entities. The vague provisions of the Cairo Principles showed that the principles of Cairo reflect *de lege ferenda* point of view because there is no practice to support the principles. In fact, these ambiguous texts do not reflect the position of the African Union. Rather, it contradicts the African position stipulated in 2012 in the African model of UJ.[127] For instance, contrary to the Cairo Principles, the text of article 15 of the African model is clear, limiting the criminal responsibility to individual criminal responsibility.[128] The African model will be discussed later in this chapter.

6.2.4: Institute of International Law Resolution on UJ with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes (2005)

The Institute of International Law adopted a resolution on UJ at its 2005 session in Krakow, where its Rapporteur was Christian Tomuschat.[129] The issued document contained six main articles on UJ regarding genocide, crimes against humanity and war crimes. Like the Princeton

[124] Ibid, See also Nadia Bernaz, 'Corporate Criminal Liability under International Law: The New TV S.A.L. and Akhbar Beirut S.A.L. Cases at the Special Tribunal for Lebanon', (2015) 13 Journal of International Criminal Justice 313, 315.
[125] Ibid.
[126] Evelyn A. Ankumah, (n 109) 238.
[127] African Union, African Union Model National Law on Universal Jurisdiction Over International Crimes, 21st Ordinary Session 9-13 July 2012 Addis Ababa, Ethiopia, Executive Council vide decision EX.CL/Dec 708 (XXI), para 15. [hereinafter, African Union Model]
[128] Ibid.
[129] The Institute of International Law Resolution, (n 14).

Principles and the Cairo Principles, the report of the Institute of International Law on UJ took the form of principles or draft articles. In contrast to them, the report of the Institute relies on the *lex lata* viewpoint.

It seems that the institute was overly cautious, which led them to leave out addressing important issues about UJ, such as definition. In fact, paragraph 1 of the Resolution deals with the definition of UJ, which is general and limited to describing UJ as an additional basis for the exercise of jurisdiction, which does not require links between the States and the crime, the alleged perpetrator, or the victim. Such a definition is ambiguous as it does not include the essential elements of jurisdiction.[130] Important elements are missing in the definition, such as whether UJ is absolute or conditionally restricted, nor does it refer to the nature of the crimes as the basis for UJ.

Notwithstanding the apparent deficiency in the definition, the third paragraph attempts to remedy this as follows: Paragraph 3 (a) provides that UJ may be exercised for genocide, war crimes and crimes against humanity.[131] Paragraph 3 (b) affirms that the exercise of UJ is condition of the presence of the accused in the territory of the State.[132] Finally, paragraph 3 (c) (d) emphasised that the exercise of UJ should be in a subsidiary manner,[133] which means that UJ will be exercised only if the State in which the crimes are committed or the State in which the accused are national is unwilling or unable to prosecute the accused.[134]

The three crimes referred to in paragraph 3 (a) are unquestionably subject to UJ. However, there are other crimes that the paragraph neglected to mention, although there is almost unanimity, they are subject to UJ, namely piracy, slavery and torture.[135] In relation to this, the research claims that there is no reason to avoid including these crimes as crimes within UJ,

[130] Claus Kreb, (n 14) 563.
[131] Institute of International Law Resolution, (n 14), Paragraph 3 (a). see also Claus Kreb, (n 14) 571.
[132] Institute of International Law Resolution, (n 14), Paragraph 3 (b). See also Claus Kreb, (n 14) 563.
[133] Institute of International Law Resolution, (n 14), Paragraph 3 (c) (d). See also ZHU Lijiang,(n 95) 217; Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept', (2004) 2 Journal of International Criminal Justice 735, 737.
[134] Report of the UN Secretary-General, (n 38) para 155.See also Luc Reydams, (n 59) 7.
[135] Abi-Saab, 'The Proper Role of Universal Jurisdiction', (2003)1 Journal of International Criminal Justice 596, 596.

especially since the practice of states and doctrinal opinions support them as a subject of UJ.[136]

Regarding the requirement of the presence of the accused and necessity to exercise UJ in a subsidiary manner, Paragraph 3(b), (c) and (b) include these two conditions in the Resolution.[137] The inclusion of the two conditions is the correct view of *lex lata* based on the states' practice mentioned in Chapter 4. As mentioned before, the states' practice of UJ has shown that the exercise of UJ is conditional on the presence of the accused and to be exercised in a subsidiary manner.[138]

Paragraph 4 stipulates that the international standards of a fair trial and human rights should be respected when prosecuting defendants based on the exercise of UJ. Furthermore, the fifth paragraph emphasises the need for cooperation between States and urges them to do so when exercising UJ. The resolution concludes with paragraph 6, which states that the exercise of UJ does not permit infringement of internationally recognised procedural immunities. In this matter, Paragraph 6 referred to the correct view of *lex lata* based on states' practice. As mentioned earlier, the holders of diplomatic immunities, such as heads of state, prime ministers and foreign ministers, during the performance of their functions enjoy temporary procedural immunity from the national criminal jurisdiction of foreign states.[139]

Here, it can be concluded that the work of the International Law Institute, although brief, has deals with a number of detailed issues regarding UJ. First, UJ is conditional on the presence of the accused in the territory of the State. Second, UJ is conditional on the exercise as a last resort. Finally, UJ should not violate the provisions of international law relating to procedural immunity of current officials. In contrast, their work lacked an accurate definition of UJ. In the context of crimes, they have overlooked the mention of torture, piracy and slavery as crimes

[136] Mahmoud Cherif Bassiouni, (n 18) 114; Pavel Caban, 'Universal Jurisdiction Under Customary International Law, International Conventions and Criminal Law of the Czech Republic: Comments', (2013) 4 Czech Yearbook of Public & Private International Law 173, 185; Fannie Lafontaine, 'Universal Jurisdiction the Realistic Utopia', (2012) 10 Journal of International Criminal Justice 1277, 1285. See also Questions relating to the Obligation to Prosecute or Extradite (n 87), p.457.

[137] Claus Kreb, (n 14) 576.

[138] Ibid. See also Report of the UN Secretary-General, (n 38) para 155. See also Malcolm N Shaw, (n 14) 735-740.

[139] On the basis of immunity arguments, national courts in the UK have rejected arrest warrant requests against Robert Mugabe President of Zimbabwe and Gen. Shaul Mofaz, defence minister of Israel. See Re Mofaz, United Kingdom, Bow St. Magistrates' Court, the judgment of 12 February 2004, ILR, vol. 128, p. 712. See also Tatchell v. Mugabe, United Kingdom, Bow St. Magistrates' Court, the judgment of 14 January 2004, ILR, vol. 136, p. 573.

under international jurisdiction. These issues should, therefore, be considered in any future study of the codification of UJ.

6.2.5: AU- EU Expert Group on UJ (2009)

After the African condemnation of the abuse of exercising UJ by European countries,[140] both the African Union and the European Union decided to put this issue on their agenda of the AU-EU Ministerial Troika in 2008. Accordingly, in November 2008, they decided to establish a specialised working group of 6 persons in order to work on an independent report expressing their personal views on the position of both the AU and EU regarding UJ. The Expert working group presented a 45- page report after they had met in January 2009 in Brussels and in March of the same year in Addis Ababa.[141]

The report provides a general definition of UJ as a criminal jurisdiction that can be exercised by a state in circumstances where none of the traditional links of the criminal jurisdiction exists, the only link between the State and prosecuted crime that could be required is the presence of the accused within the jurisdiction of that State.[142] Following this, the report highlighted crimes which can be subject to UJ. In this regard, the Expert Group provided that piracy, war crimes, genocide, crimes against humanity, and torture are subject to UJ.[143] The report then highlighted the preconditions that states require for exercising UJ. In this matter, the report mentioned that a large number of countries require that the accused be present as a condition for exercising UJ.[144] The above-mentioned points represent the correct view of *lex lata* based on states' practice as mentioned in Chapter 4.

It is worth noting that the report included a survey on the legislative approaches in the national legislation of African and European countries towards UJ. In this regard, this report was more comprehensive as it includes the position of a significant number of African countries on UJ, unlike the ILA Report which was limited to the position of 13 Western countries, none of which were African countries. Accordingly, the Expert Group report

[140] Mark A. Summers, (n 55) 68.
[141] AU–EU Technical Ad hoc Expert Group Report on the Principle of Universal Jurisdiction, Council of The European Union, Brussels, (April 16, 2009), Doc. No. 8672/1/09 REV 1 [hereinafter AU–EU Expert Report].See also Martin Mennecke, 'The African Union and Universal Jurisdiction', in Charles Chernor Jalloh and Ilias Bantekas (eds), *The International Criminal Court and Africa*, (1st edn, Oxford University Press, 2017) 16.
[142] ibid, para. 8.
[143] ibid, para. 9.
[144] ibid, para 10.

stressed that UJ is not a Western concept, but rather it is universal principle enshrined in a large number of national laws of African countries.[145] In fact, the report observed that 35 African countries have established in their national legislations' UJ over one or more international crimes.[146] Nevertheless, it was conceded that the difference between African and European countries in the exercise of UJ is the lack of practical capacity to exercise UJ in many African countries.[147] In this regard, the research believes that the opinion of the Expert Group can be attributed to the economic situation and political instability in a number of African countries. Nevertheless, recently the AU has urged countries to take serious steps to close the impunity gap and cooperate to this end.[148] Perhaps the most prominent example is the cooperation between the African Union and Senegal in Habre's trial. As mentioned in Chapter 5, Senegal and the African Union decided in 2012 to set up a special tribunal to try former Chadian President Hissene Habré.[149]

Towards the end of the report, it notes a number of points of concern to both the AU and the EU. In this matter, the AU has affirmed that UJ is an effective means of combating impunity and is in line with the provisions of Article 4 (h) of the Constitutive Act of the African Union.[150] Article 4 (h) authorises the AU to intervene in the event of international crimes and grave violations of human rights being committed in one of the AU member states. However, the AU has expressed concern that this principle is being used selectively, threatening the sovereignty of African countries.[151] In this regard, they expressed serious concern that some European countries would use UJ over holders of diplomatic immunities in contravention of international law.[152] On the other hand, the EU expressed its understanding of the concerns of African countries but expressed that these concerns should not be exaggerated.[153] In

[145] ibid, para 16-17, and 19. See also Martin Mennecke, (n 141) 17.
[146] Martin Mennecke, (n 141) 17.
[147] AU–EU Expert Report, (n 140), para 19; Martin Mennecke, (n 141) 17.
[148] Human Rights Watch, Senegal: Hissène Habré Verdict Scheduled May 30, 3 May 2016, available at http://www.refworld.org/docid/5729b3544.html [accessed 26 July 2018]
[149] Statute of the Extraordinary African Chambers, (Unofficial translation by Human Rights Watch) September 2, 2013, available at https://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers [accessed 1 April 2019].See also Roland Adjovi, 'The Agreement on the Establishment of the Extraordinary African Chambers within the Senegalese Judicial System Between the Government of the Republic of Senegal and the African Union and the Statute of the Chambers', (2013) 52 International Legal Materials 1020, 1035-1036.
[150] Constitutive Act of the African Union art. 4, July 11, 2000, 2158 U.N.T.S. 3. 53.
[151] AU–EU Expert Report, (n 140), para 34, 35.
[152] Charles Chernor Jalloh, 'Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction', (2010) 21 Criminal Law Forum 1, 14.
[153] AU–EU Expert Report, (n 140), para 40.

relation to this, the EU expressed the number of cases of exercising UJ is very small, especially for those with diplomatic immunities. In practice, most EU countries have refrained from exercising UJ over officials with diplomatic immunities under international law.[154]

Finally, the report concludes with 17 recommendations. The recommendations generally urge states to close the impunity gap for perpetrators of the most serious crimes, including genocide, war crimes, crimes against humanity and torture.[155] Additionally, the report urges States in which the accused are present to prosecute or extradite the accused.[156] Although the report considers that there is no mandatory hierarchy of jurisdictions, it recommends that States give priority to a State on whose territory the crime was committed.[157] Conversely, the report also recommended that diplomatic immunities defined under international law should be respected in exercising UJ.[158] It is worth noting that the report recommended that "the AU Commission should consider preparing model legislation for the implementation of measures of prevention and punishment".[159] In response to these recommendations, in 2012 the African Union issued the African Model Document on UJ, which will be discussed in the next section. In general, the research finds that the report was a step in the right direction, which illustrates the regional situation in Europe and Africa from the principle of UJ. It could, therefore, be used in a future attempt to codify UJ by the ILC. According to Article 38(1)(d) of the ICJ Statute this report could be considered as a subsidiary source for determining the rules of international law.

6.2.6: The African Union Model Law on UJ (2012)

The AU issued a model on UJ in 2012 based on the recommendations of the expert report, which urged the AU to encourage the AU countries to adopt national legislation authorizing the exercise of UJ by preparing a model on UJ.[160] Accordingly, at the AU Summit in 2012, Ministers of Justice and the Attorney Generals of African countries recommended adopting a model law on UJ.[161] The African model included 20 provisions dealing with detailed issues

[154] Martin Mennecke, (n 141) 17.
[155] AU–EU Expert Report, (n 140), para 46R1.
[156] ibid, para 46 R4.
[157] Ibid, para 14 and para 46 R9.
[158] ibid, para 46 R8.
[159] ibid, para 46 R2.
[160] Ibid, para 46 R2.
[161] African Union Model, (n 127).

related to the exercise of UJ.[162] In general, the African model avoided providing a definition of UJ. On the other hand, paragraph 4 (1) provided that:

> The national court shall have jurisdiction to try any person alleged to have committed any crime under this law, regardless of whether such a crime is alleged to have been committed in the territory of the State or abroad and irrespective of the nationality of the victim, provided that such a person shall be within the territory of the State.*[163]*

The paragraph addressed the issue of the presence of the accused as a condition for the exercise of UJ. In this regard, the paragraph explicitly stated that the presence of the accused is a condition for trial but did not specify its position on other measures such as issuing arrest warrants. It is noteworthy that the text of the above-mentioned paragraph is unclear and ambiguous. Accordingly, Doba claimed that the requirement for the presence of the accused in article 4 is limited to trial only and does not extend to the investigative phase.[164] In contrast, Amnesty international argued that:

> Although, as noted above, there is no requirement of presence to open an investigation, the model law does not make it clear (Article 4) whether the police can open an investigation or a prosecutor seek an arrest warrant or request extradition if the suspect is not in the country where the court is located.*[165]*

It is clear that nothing in the text authorises the exercise of UJ and investigation in absentia. The research also noted, in accordance to the States' practices discussed in chapter four, the presence of the accused is a condition for investigation and the exercise of UJ in most national legislations.[166] The research tends to explain that the African model requires the presence of the accused to exercise UJ because African countries have a clear fear of abuse of UJ,

[162] Martin Mennecke, (n 141) 18.
[163] African Union Model, (n 127), para 4(1).
[164] Dapo Akande, The African Union, the ICC and Universal Jurisdiction: Some Recent Developments; (EJIL: Talk!, August 29, 2012), available at http://www.ejiltalk.org/the-african-union-the-icc-and-universal-jurisdiction-some-recent-developments/ (accessed 21/11/2019)
[165] Amnesty International, African Union Summit Is A Key Test of Commitment to The Fight Against Impunity, AI Index: IOR 63/002/2012, 9 July 2012, available at https://www.amnesty.org/download/Documents/24000/ior630022012en.pdf (accessed 21/11/2019)
[166] Report of the UN Secretary-General, (n 38) para 63-100, at 13-20. See also Olympia Bekou and Robert Cryer, (n 20) 56.

especially when exercised in absentia or with diplomatic immunities.[167] Thus, it is arguably illogical to state that the AU authorises the exercise of UJ in absentia.

Paragraph 4 (2) affirms that the exercise of UJ should be in a subsidiary manner,[168] which means that UJ will be exercised only if the State in which the crimes are committed or the State in which the accused are national is unwilling or unable to prosecute the accused.[169] With regard to immunities, the African model stated that diplomatic immunities recognised under national and international law should be respected.[170] It is worth mentioning that the aforementioned conditions are in line with the research findings in Chapter 3, where it concluded that the exercise of UJ is conditional on the presence of the accused and the need to respect diplomatic immunities, as well as the need for UJ to be exercised in a subsidiary manner.

The African model stipulated six crimes that are considered a subject to UJ, namely genocide, war crimes, crimes against humanity, piracy, terrorism and drug trafficking.[171] Interestingly, the African model has overlooked slavery and torture as being subject to UJ, while terrorism and drug trafficking have been classified as crimes under UJ. This classification contradicts the findings of the research mentioned in Chapters 3 and 4 through an analysis of States' practice regarding UJ. In this matter, it was observed that the States' practices have shown that torture and slavery are considered as a violation of peremptory norms under international law.[172] On the other hand, the crimes of terrorism and drug trafficking are still controversial and there is insufficient practice to supports their consideration as subject to UJ.[173]

Contrary to the Cairo Principles, the text of article 15 of the African model is clear, limiting the criminal responsibility to individual criminal responsibility.[174] In this matter, the African model

[167] Report of the Sixth Committee (n 3); UNGA Resolution (n 3). See also Gabriel Bottini, (n 20) 556-559; Manisuli Ssenyonjo, 'The Rise of the African Union Opposition to the International Criminal Court's Investigations and Prosecutions of African Leaders', (2013) 13 International Criminal Law Review 385, 425.
[168] African Union Model, (n 127), para 4(2).
[169] Jo Stigen, 'The Relationship between the Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes', in Morten Bergsmo (ed), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes,* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 141, 153-157.
[170] African Union Model, (n 127), para 16.
[171] ibid, para 8.
[172] Mahmoud Cherif Bassiouni, (n 18) 114.
[173] Markus Petsche, 'Jus Cogens as a Vision of the International Legal Order', (2010) 29 Penn State International Law Review 233, 251.
[174] African Union Model, (n 127), para 15.

emphasises individual responsibility and does not extend the scope of criminal responsibility to include the controversial issue relating to the criminal liability of other legal entities.[175] As mentioned above, the criminal liability under international criminal law is limited to natural persons and does not extend to other legal entities.[176] This point of view was emphasised at the Rome Conference to establish the International Criminal Court.

It is worth highlighting that the African model, similarly to Princeton Principles,[177] contained general provisions concerning the right of the accused to a fair trial and witness protection, which are set forth in Articles 6 and 7, respectively. Article 16 also urges States to prosecute defendants pursuant to the principle of UJ or to extradite them to countries willing and able to prosecute them. Additionally, Article 17 requires States to cooperate in the exercise of UJ.

In conclusion, it can be concluded that the African model is a regional attempt to codify UJ and urge States to exercise it in order to bridge the impunity gap. The African model is very similar to most previous attempts on UJ, such as Princeton Principles, as they analytically address UJ by relying on *lex lata* point of view, as well as, they have proposed some point of view based on *de lege ferenda.* Additionally, the African model did not settle the controversy surrounding the crimes of UJ, as they expanded the scope of the crimes and failed to set a clear standard for defining the scope of these crimes. Accordingly, there is still an urgent need to codify UJ more precisely at the international level.

6.2.7: The Work of the UN Sixth Committee since 2009 on UJ

International criminal law witnessed a remarkable development in the late twentieth century with the establishment of the ICTY, ICTR, and ICC.[178] There has concurrently been a marked increase in the adoption of UJ by States in their national legislation.[179] However, as has been noted, condemnation of misuse of UJ has also increased, especially after the Belgian case in which it attempted to exercise UJ in absentia against a foreign minister of the Congo.[180] It is noteworthy that all the proposals mentioned above have not provide a fundamental solution

[175] Cairo Principles, (n 108) principle 2.
[176] Report of the International Law Commission, (n 119) para 248-250, at 119 -121.
[177] The Princeton Principles on Universal Jurisdiction, (n 26) principles 4, 6, 7, 9, 10 and 14.
[178] ICTY Statute, (n 52); ICTR Statute (n 52): Rome Statute, (n 52) para. 1-4 of the Preamble.
[179] Amnesty International Universal Jurisdiction Preliminary Survey of Legislation around the World – 2012 Update, Index: IOR 53/019/2012, October 2012, 1-2. See also William A. Schabas, (n 19), 20.
[180] Arrest Warrant Case, (n 21), Immunity and inviolability of an incumbent Foreign Minister in general (paras. 47-55) p 18-20. See also See also Gabriel Bottini, (n 20) 507.

in determining the concept of UJ and the scope of its practice.[181] This is due to the fact that they have failed to set a clear standard for defining the scope of UJ and preconditions for exercising such jurisdiction. Additionally, they "merely provides guidance and it has not grown to have substantive influence on the development of UJ, although it has provided some directions to courts invoking UJ".[182]

Therefore, in 2009 the UN was asked to determine the definition and scope of UJ to avoid alleged misused.[183] Accordingly, the Sixth Committee was mandated by the UNGA to consider the issue of UJ.[184] A request was also sent to all State Members of the UN to contribute by providing information and observations on UJ and its application in their national legislations.[185] The UNGA resolutions since 2009 have invited the ''Member States to submit ... information and observations on the scope and application of the principle of UJ, including information on the relevant applicable international treaties, their domestic legal rules and judicial practice''.[186] Accordingly, since 2009 the issue of defining the concept and scope of UJ has been debated at the UN.

There has been significant participation of countries in the work of the UN on UJ. In fact, States have remarkably expressed their views on the concept of UJ. Thus, the UN archive contains abundant information on the position of states on UJ. However, the UN has still not reached an overall conclusion on the definition and concept of UJ because of the breadth of the discussion and the differences of views between countries.

There seem to be three main areas of disagreement between States, as noted by the Sixth Committee of the UNGA working group in an informal paper.[187] These factors are: firstly, defining UJ conceptually, and distinguishing this from interconnecting or similar concepts;

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[181] Petra Baumruk (n 3) 62.
[182] Ibid.
[183] Report of the Sixth Committee (n 3); UNGA Resolution (n 3).
[184] ibid
[185] ibid
[186] ibid
[187] Sixth Committee of the UNGA, Informal Working Paper prepared by the Chairperson for discussion in the Working Group - The scope and application of the principle of universal jurisdiction [87], is for the purpose of facilitating further discussion in the light of previous exchanges of views within the Working Group, pp. 1-7 (4 November 2016) It merges various informal papers developed in the course of the work of the Working Group between (2011 - 2014). available at http://papersmart.unmeetings.org/media2/19409767/wg-universal-jurisdiction-informal-working-paper.pdf (Accessed, 5/12/2019) [hereinafter Sixth Committee of the UNGA, informal working paper].

secondly, the scope applied to UJ, such as to which crimes it may be applied, and how many of these crimes should be applicable in international law; and thirdly, instructions for applying this jurisdiction, such as criteria and conditions for applying it, and procedures and practical factors. These may include the following areas: deciding if a suspected criminal under this jurisdiction must be within the state's territory prior to investigating or taking other actions, establishing what role a national judicial system takes, connections with various international legal concepts, states co-operating and assisting each other internationally, such as two-way legal help, technical assistance, and various horizontal interactions regarding crime; potential prioritising of a territorial state's right to take action against another state based on links with the crimes allegedly committed; potential for applying a statute of limitations, as well as standards of due process agreed internationally, such as rights to fair trial and *ne bis in idem,* which precludes double jeopardy, and connections to standard obligations set out in treaties for extradition or prosecution of particular crimes *aut dedere aut judicare,*[188]

As stated above, from 2009 onward, UJ has been discussed by the Sixth Committee each year, and this should give significant results in terms of clarity on the differences between states' views on this principle.[189] However, wider developments have not happened as quickly as expected and at the beginning of 2018 the African Union expressed its disappointment regarding an "impasse" on UJ within the UNGA, calling for the Assembly's African Group to propose methods for progressing the discussion at the New York summit.[190] Failure to achieve significant movement on this issue to date may be partly based on a lack of political consensus around selectivity and arbitrariness in applying the principle of universality. For example, at the debate of the UNGA on UJ in 2017, while almost all delegates agreed that there was a need to make progress, there were differences concerning how to define the concept, its scope, character and limitations, which are present in each debate since 2010.[191]

The reason for the delay of the UN in reaching a conclusion on the subject of UJ is due partly to the way in which the UN discussed UJ was very broad and opened up controversial

[188] Charles Chernor Jalloh, Universal criminal jurisdiction, in Report of the International Law Commission on the Work of its 70th Session' [Annexes. A] (2018) UN Doc A/73/10, para 8, at 309-310.
[189] Report of the Sixth Committee (n 3); UNGA Resolution (n 3). See also United Nations, 72nd Session, (n 4).
[190] African Union, Decision on the International Criminal Court, Assembly/AU/Dec.672(XXX), Doc.EX.CL/1068(XXXII), para. 5(v), p. 2. In Assembly/AU/Dec.665-689(XXX), Thirtieth Ordinary Session, Addis Ababa, Ethiopia, 28–29 January 2018.
[191] Charles Chernor Jalloh, (n 188), para 9, at 310.

issues.[192] It would arguably be better for the UN to focus on three main issues only: defining UJ, determining conditions for its exercise, and crimes over which the jurisdiction could be exercised.[193] Secondly, the composition and mechanism of the UNGA may not help to reach a conclusion on UJ. The UNGA consists of representatives of all of the UN State Parties and decisions of the Assembly are passed by majority.[194] In such an environment, it is difficult to reach agreement on a controversial legal subject such as UJ.

The research therefore considers that this issue should be referred to the ILC. It is worth mentioning that the issue of referring the discussion of UJ to the ILC instead of the Sixth Committee of the UNGA has been raised by a number of countries.[195] However, some countries preferred that the issue be discussed with the Sixth Committee of the UN[196] because they want the representatives of their countries to continue to participate in the work on UJ, as the Sixth Committee of the UNGA is made up of all member states of the UN. In addition, it was suggested that a special working group be established to work on this issue under the Sixth Committee.[197] In the end, discussion of the topic remained with the Sixth Committee of the UN, although the discussion has not reached a conclusion since 2009.[198] Therefore, the dissertation believes that the ILC is currently able to find a point of convergence on defining the concept and scope of UJ.[199] This is because of the prominent role of the ILC in the progressive development and codification of international law. In this context, the following claim can be cited

> The ILC can draw on its members' specialized knowledge and experience to prepare draft texts that more accurately assess existing state practice and opinio

[192] Ibid, para 8, at 309-310.
[193] Ibid, para 26, at 316.
[194] Charter of the United Nations (n 11), art 9 (1), art 18.
[195] Peru, UN Doc. A/C.6/64/SR.12(25 November 2009), para 71; Switzerland, ibid, para 24. See also Belarus, UN Doc. A/C.6/65/SR.10 (3 November 2010), para 77; See also Argentina UN Doc. A/C.6/65/SR.11 (14 January 2011) para 28; Vietnam, ibid, para 47; Germany, ibid, para 75; The Republic of Korea, ibid para 15. See also Nigeria, UN Doc. A/C.6/65/SR.12 (10 November 2010) para 41; Lesotho, ibid, para 39. See also Peru, UN Doc. A/C.6/68/SR.13 (6 January 2014), para 45; Guatemala, ibid, para 24.
[196] Tunisia on behalf of the African Group UN Doc. A/C.6/64/SR.12(25 November 2009) para 16; China, ibid, para 51; Russia UN Doc. A/C.6/64/SR.13 (24 November 2009) para 14-17. See also Tanzania, UN Doc. A/C.6/65/SR.11 (14 January 2011), para 45; Ethiopia, ibid, para 70. The Sixth Committee is one of the primary committees of the GAUN that consider the legal issues in the GAUN.
[197] Report of the UN Secretary-General, The Scope and Application of the Principle of Universal Jurisdiction, Sixty-fifth session, UN. Doc. No A/65/181 (29 July 2010), para 110. See also South Africa, UN Doc. A/C.6/65/SR.11 (14 January 2011) para 77; Chile on behalf of the Rio Group, UN Doc. A/C.6/65/SR.10 (3 November 2010), para 58.
[198] Martin Mennecke, (n 141) 23, 25 and 30.
[199] Charles Chernor Jalloh, (n 188), at 312.

> juris. The ILC might also be able to prepare these texts more efficiently than the General Assembly due to its significantly smaller size and the fact that its members serve in their personal capacities rather than as representatives of states.[200]

Additionally, it was argued that if the ILC studies the issue of UJ, it could lead to providing draft conclusions or guidance which could contribute to the consideration of the topic by the Sixth Committee. In fact, action to develop and codify UJ seems possible currently based on the large body of evidence on state practices doctrine and precedents. It should also be noted that there has been much progress made by the ILC and the Sixth Committee to develop criminal law through collaborative efforts. Turning attention to UJ would represent a continuation of this work, including but not exclusively related to developing international legal principles set out in the Nuremberg Tribunal's charter, in its 1950 judgement, and in the 1994 draft statute to establish an international criminal court on a permanent basis.[201]

With regard to cooperative efforts between the ILC and the Sixth Committee, it was noted that the statements of States during the work of the Sixth Committee on UJ can be used by the ILC in any future attempt at codification. This is due to the fact that the statement of the states constitutes a comprehensive database for any study to analyse State practice and to draw from it the customary international rules relating to UJ. It is worth highlighting that the relationship between the UN and the ILC is also very close. This is due to the fact that the ILC was established by a UN resolution to codify and promote the progressive development of international law.[202] Accordingly, the Principal-agent theory has been used in a number of previous studies to understand the relationship between the ILC and the UN.[203] In this matter, it was mentioned that

> The theory, which has been widely applied to the study of legal institutions, including international organizations, builds upon rational-choice theories of domestic and international politics. It posits that self-interested actors involved in governance and

[200] Laurence Helfer and Timothy Meyer, 'The Evolution of Codification: A Principal-Agent Theory of the International Law Commission's Influence', in Curtis Bradley (ed), *Custom's Future: International Law in a Changing World,* (Cambridge University Press 2015) 309.
[201] Yearbook of the ILC 1950 Volume II, A/CN. 4/SER.A/1950/Add. 16 June 1957. Formulation of The Nurnberg Principles, at 374-378. See also Draft Statute for an International Criminal Court with commentaries, 22 July 1994, at Yearbook of the ILC 1994, vol. II, (Part Two) Doc. No. A/CN.4/SER.A/1994/Add.l (Part 2), para. 91. [hereinafter, Draft Statute for ICC].
[202] UNGA Resolution 174 (II) of 21 November 1947 (Establishment of an International Law Commission). A/RES/174(II), A/PV.123 21 Nov. 1947 44-0-6, A/504. [hereinafter UNGA Resolution 174 (II)].
[203] Laurence Helfer and Timothy Meyer, (n 200) 309. See also Abdualbaset Alfaidi, *Diplomatic Protection in Contemporary International Law*, (PhD Thesis Brunel University London, 2019) 22.

> policymaking – such as voters or legislators at the domestic level, and states at the international level – delegate power to other actors – such as domestic administrative agencies or international organizations – to provide benefits that the principals could not achieve on their own.[204]

In general terms, delegating the codification of UJ could be desirable because the agent, for example, has superior knowledge or experience, so, the agent can perform a task more efficiently, or because the principal has limited time or resources.[205] In fact, this hypothesis supports the suggestion that UJ should be referred to the ILC to determine the concept and scope of this principle. This is due to the fact that the UN has failed to reach a conclusion on UJ, although it has been working on this issue since 2009.[206] Secondly, the prominent role of the ILC in the progressive development and codification of international law supports the view that the ILC could be the best specialized group to codify UJ. Particularly, the ILC has recently examined a number of topics relating to UJ. Such as, the subject of the obligation to extradite or prosecute (aut dedere aut judicare);[207] Immunity of State officials from foreign criminal jurisdiction;[208] and Peremptory norms of general international law (jus cogens).[209] The Commission's findings from the study of the above-mentioned topics will help it to understand the problems that revolve around the concept of UJ.

6.3: A Corrective Step: Referring the Issue of Determining the Concept and Scope of UJ to the ILC.

In this section, the research argues that delegating the ILC to work on determining the concept and scope of UJ will be a corrective step. In order to discuss this issue, the research will firstly analyse the role of the ILC on the codification of international law. Then, it will examine the position of the ILC on the codification of UJ. Finally, the research will elaborate

[204] Laurence Helfer and Timothy Meyer, (n 200) 309.
[205] ibid.
[206] Charles Chernor Jalloh, (n 188), at 311.
[207] Yearbook of the ILC 2014, vol. II (Part Two), Doc. No. A/CN.4/SER.A/2014/Add.1 (Part 2) at 91-92.
[208] International Law Commission, (n 46).
[209] See also International Law Commission, seventy-first session Geneva, fourth report on peremptory norms of general international law (jus cogens) Prepared by Dire Tladi, Doc. No A/CN.4/727, 31 January 2019.

on whether the topic of UJ meets the criteria for inclusion topics into a long-term program of work for the ILC.

6.3.1: The Role of the ILC on the Codification of International Law

The ILC was established by the UNGA resolution 174 (II) of 21 November 1947,[210] pursuant to Article 13, paragraph 1, of the Charter of the UN, which provides that it "shall initiate studies and make recommendations for the purpose of … encouraging the progressive development of international law and its codification."[211] Once established, the committee was entrusted with the task of formulating the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal.[212] Additionally, the ILC was entrusted with other tasks, perhaps the most prominent of which were the submission of draft articles on the Law of Treaties with commentaries, 1966,[213] as well as the 1994 draft statute to establish an international criminal court on a permanent basis.[214] In general terms, the ILC was entrusted with two main tasks, the codification and encouraging the progressive development of international law. According to Article 15 of the ILC Statute, the codification means that [it] "is a convenient term used to mean the precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine".[215] In contrast, progressive development means that "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States"[216]

It is worth noting that the role and effectiveness of the ILC in the codification and progressive development of international law has been debated previously. There are a number of

[210] UNGA Resolution 174 (II), (n 201).

[211] Charter of the United Nations (n 11), Art 13(1). See also Michael Wood, Introductory Note for the Statute of the International Law Commission, United Nations Audiovisual Library of International Law. Available at <https://legal.un.org/avl/ha/silc/silc.html> (Accessed 27/11/2019).

[212] UNGA Resolution 177 (II) of 21 November 1947 (Formulation of the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal), No. A/RES/177. See also Mahmoud Cherif Bassiouni, 'The History of the Draft Code of Crimes against the Peace and Security of Mankind', (1993) 27 Israel Law Review 247, 248. See also Yearbook of the ILC 1950 Volume II, (n 201) at 374-378.

[213] Yearbook of the ILC 1966, vol. II. Doc. No (A/CN.4/SER.A/1966/Add.l). Draft Articles on the Law of Treaties with commentaries 1966, at 187.

[214] Draft Statute for ICC, (n 200).

[215] Statute of the International Law Commission 1947, adopted by the General Assembly in resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981. Art 15. [hereinafter. Statute of the ILC]

[216] Ibid.

scholars who praise the ILC's role in codifying international law.[217] For instance, Wood stresses that:

> Without its painstaking efforts, there would have been no Vienna Convention on Diplomatic Relations, no Vienna Convention of the Law of Treaties, no Articles on the Responsibility of States for Internationally Wrongful Acts,[….] and without its careful working method any instruments on these subjects would surely not have been technically so sound and achieved such widespread acceptance.*[218]*

Some also argued that the role of the ILC could be almost equal to that of the ICJ. In this matter, it was argued that "it would be no exaggeration to say that it has come to be regarded as rivalling in importance the work of the ICJ".[219] The question that arises is the extent of the legal value of the Commission's output. In this matter, it was argued that the legal value of the ILC's productivity is the same as that of the teachings of the most highly qualified publicists. According to article 38 (1) (d), the teachings of the most highly qualified publicists and judicial decisions are considered as subsidiary means for the determination of rules of law.[220] This point of view was confirmed by Brownlie, who stated that "sources analogous to the writings of publicists, and at least as authoritative, are the draft articles prepared by the ILC".[221] A similar point of view is asserted by, Parry, who claims that the outputs of the ILC "represent the teaching of the most highly qualified publicists".[222]

However, there is another view which argues that the output of the ILC has legal value higher than the teaching of the most highly qualified publicists. In this regard, they explain that the views to the teachings of publicists are hardly cited a few times by the ICJ, contrary to the outputs of the ILC, which is commonly cited by the ICJ. Additionally, it was argued that the ICJ increasingly uses the products of the ILC as a means of ensuring their application of the rules of international law.[223] In this matter, it was claimed that the ICJ often cites the work of the

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[217] Allain Pellet, 'Responding to New Needs through Codification and Progressive Development', in Vera Gowland-Debbas (ed), *Multilateral Treaty-Making: The Current Status of Challenges to and Reforms Needed in the International Legislative Process,* (Martinus Nijhoff Publishers 2000) 23.

[218] Michael Wood, 'The General Assembly and the International Law Commission: What Happens to the Commission's Work and Why?', in Isabelle Buffard and others (eds), *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner,* (Martinus Nijhoff Publishers 2008) 387.

[219] Allan Gotlieb, 'The International Law Commission', (1966) 4 Canadian Yearbook of International law 64, 64.

[220] Statute of the International Court of Justice, (n 27) art 38 paragraph 1 (d).

[221] Ian Brownlie, *Principles of Public International Law*, (7th edn, Oxford University Press 2008)24.

[222] Clive Parry, *The Sources and Evidences of International Law,* (Manchester University Press 1965) 114.

[223] Alain Pellet, 'Article 38 of the Statute of the International Court of Justice', in Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary,*

ILC in interpreting and determining the position of certain provisions of the Conventions prepared by the ILC.[224] Interestingly, reliance upon the ILC's work led Borden to argue that considering the ILC output "as an instance of the work of the law professors does not fully account for the role that these texts play in international argument".[225]

Furthermore, it was suggested that some of the provisional conclusions reached by the ILC have been approved by the Court, without hesitation, independently of any treaties or decisions.[226] In so doing, the court implicitly admits, at least that the ILC's findings possess the characteristics of rule-legitimacy which were set by Frank: "determinism, symbolic validation, consistency, and commitment".[227] It is worth mentioning that the output of the ILC has been used as a reflection of the international customary rule. In this matter, it was mentioned that the ILC's outputs have been cited by the ICJ to support its finding on international custom.[228] For example, the ICJ in North Sea Continental Shelf Cases cited the work of the ILC to establish whether or not a customary rule existed.[229] In this matter, the ICJ stated that "there is no indication at all that any members supposed that it was incumbent on the ILC to adopt a rule of equidistance".[230] By contrast, "the principle was proposed by the ILC with considerable hesitation, somewhat on an experimental basis, at most de lege ferenda, and not at all de lege lata or as an emerging rule of customary international law".[231] Accordingly, it is clear that the Court has used the work of the ILC as evidence of the lack of customary rule without further investigation into the existence of State practice.[232]

(Oxford University Press 2006) 792. See also Michael Wood, 'Teachings of the Most Highly Qualified Publicists (Art. 38 (1) ICJ Statute)', in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law: Vol II*, (Oxford University Press 2012) 783.

[224] Ibid.

[225] Fernando Bordin, 'Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law', (2014) 63 (3) International and Comparative Law Quarterly 535, 573.

[226] Benedict Chigara, 'The Administration of International Law in National Courts and the Legitimacy of International Law', (2017) 17 (5) International Criminal Law Review 909, 930.

[227] Thomas Frank, *The Power of Legitimacy among Nations,* (1st ed, Oxford University Press 1990) 58.

[228] Alain Pellet, (n 223) 792.

[229] North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. the Netherlands), Judgment of 20 February 1969 (1969) ICJ Rep 3

[230] ibid, para 49

[231] ibid, para 62.

[232] See also, Legal Consequences for States of the Continued Presences of South Africa in Namibia, Advisory Opinion of 21/6/1971 (1971) ICJ Rep 47, para 94; Jurisdictional Immunities of the State (Germany v Italy; Greece intervening), Judgment of 3/2/2012 (2012) ICJ Rep 99, para 66, 117 and 129.

In light of the above analyses, it can be concluded that given the importance of the role and outputs of the ILC reflecting customary international law, the research supports the view that the ILC is the best body of experts for codifying UJ, particularly as UJ is based on customary law. Additionally, the mechanism of work of the ILC is significantly different from the mechanism of work of the Sixth Committee. As mentioned earlier in this chapter, the composition and workings of the Sixth Committee of the UNGA may not help to reach a conclusion on UJ as the Sixth Committee consists of representatives of all of the UN State Parties and decisions of the Assembly shall be passed by majority. In such an environment, it is difficult to reach agreement on a controversial legal subject, such as UJ. The research, therefore, considers that this work should be done by the ILC.

6.3.2: The Position of the ILC on the Codification of UJ

It was observed that the issue of exercising UJ was discussed by the ILC when it was working on the DCCAPSM.[233] Indeed, in 1988 the principle of UJ in national courts was adopted by the ILC to effectively be the basis for this Code.[234] This was also confirmed in the final version of Draft Code 1996 under Article 8, which provided that "Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17, 18, 19 and 20, irrespective of where or by whom those crimes were committed"[235].

In this regard, the ILC claimed that the concept of UJ should be applied by national courts.[236] This is because it would be impossible for an international criminal court alone to try and punish the huge number of offenders who have allegedly committed international crimes,[237] not only because of the number of crimes that have been committed but also as these kinds of crimes are usually committed as part of a general policy that involves large numbers of participants.[238] On the other hand, some members of the ILC expressed their concerns about the disarray that would result from implementing UJ by national courts over the crime against

[233] DCCAPSM, (n 72). See also Yearbook of the ILC 1988, Volume I. Doc. No A/CN.4/SER.A/1988 para 15.
[234] Bernhard Graefrath, 'Universal Criminal Jurisdiction and an International Criminal Court', (1990) 1 European Journal of International Law 67, 72.
[235] DCCAPSM, (n 72), art 8, p 27.
[236] Ibid.
[237] Kevin Jon Heller, 'What Is an International Crime? (A Revisionist History)', (2017) 58 Harvard International Law Journal 353, 368.
[238] Yearbook of the ILC 1996, vol. II (Part Two). Doc. No. A/CN 4/SER A/1996/Add1, at 28.

the peace and security of mankind.[239] Therefore, the ILC recommended to DCCAPSM that a combined approach to jurisdiction based on the possible jurisdiction of an international criminal court together with the implementation of UJ by national courts is required for effective implementation.[240]

It is worth noting that the ILC did not discuss UJ and its implementation independently as an end in itself, rather they discussed it as a method to apply the DCCAPSM.[241] Therefore, it cannot be considered as a comprehensive study of UJ.

The ILC has recently decided to include the subject of extraterritorial jurisdiction in its long-term program of work. Interestingly, however, in its 2006 report, it explicitly stated that UJ will not be within the scope of the topic of extraterritorial jurisdiction.[242] In this matter, The ILC stated:

> the notion of extraterritorial jurisdiction may be understood as referring to the exercise of jurisdiction by a State with respect to its national law in its own national interest rather than the application of foreign law or international law. A State's application of foreign law or international law rather than its own national law would therefore be excluded from the scope of this topic since these situations would not constitute the exercise of extraterritorial jurisdiction by a State in relation to its national law based on its national interests.*[243]*

Regarding UJ, the ILC clearly provided that:

> The universality principle may be understood as referring to the jurisdiction that any State may exercise with respect to certain crimes under international law in the interest of the international community. A State may exercise such jurisdiction even in situations where it has no particular connection to the perpetrator, the victim or the locus situs of the crime. Thus, a State may exercise such jurisdiction with respect to a crime committed by a foreign national against another foreign national outside its territory. However, a State exercises such jurisdiction in the interest of the international community rather than exclusively in its own national interest, and thus, this principle of jurisdiction would fall outside of the scope of the present topic.*[244]*

[239] Yearbook of the ILC 1983, Volume I, Doc. No. A/CN.4/SER.A/1983, para. 22; Yearbook of the ILC 1986, Volume I, Doc. No. A/CN.4/SER.A/1986, para. 32. See also Bernhard Graefrath, (n 234) 78.
[240] Yearbook of the ILC 1996, (n 238) at 28-30. See also Bernhard Graefrath, (n 234) 72.
[241] Ibid.
[242] Charles Chernor Jalloh, (n 188), at 312.
[243] Report of the International Law Commission, (n 62) Annex E, `Extraterritorial jurisdiction` para 7, p 520.
[244] Ibid, para 16, p 522.

By analysing the previous two texts, the following can be observed: the concept of extraterritorial jurisdiction means the jurisdiction that is exercised by a state for its national interests exclusively over acts occurring outside its territory. In addition, the 2006 report of the ILC emphasised that the scope of the study of extraterritorial jurisdiction includes commercial and criminal issues. It is thus distinguishable from UJ, which is exclusively a criminal jurisdiction that is exercised by the national court of a state on behalf of the international community over criminal acts committed outside its territory.

It is worth mentioning that the basis of the difference between the two concepts is that one is exercised for the interests of the State and the other for the benefit of the international community as a whole. The second difference is that the extraterritorial jurisdiction includes criminal and commercial matters, whereas UJ is limited to criminal issues only. Consequently, the ILC did not include UJ when examining the extraterritorial jurisdiction because it was outside the scope of the target study.

It therefore needs to be determined whether the ILC study of UJ will contradict its current study of extraterritorial jurisdiction. As noted above, UJ is exercised for the benefit of the international community, so it is outside the scope of the ILC`s examination of the subject of extraterritorial jurisdiction which is exercised by States for their own interests. Therefore, the research considers that there is unlikely to be conflict if the ILC examines UJ independently. This is due to the fact that the two subjects are not considered to replicate or infringe upon the other.[245] This view was confirmed by Jalloh who believes that extraterritorial jurisdiction as defined for discussion, while it includes commercial and criminal issues, specifically excludes consideration of UJ based on the distinctive character of the principle. Therefore, adding UJ to the long-term working agenda would bring complementarity and not replication in this regard.[246]

More recently, the ILC has decided to include the topic of UJ in its long program of work. Although UJ has not yet been placed on the ILC's active agenda, its placement in the Committee's long-term work is arguably a step in the direction towards codification. The ILC appointed one of its members, Charles C. Jalloh, to prepare a report on UJ, which is annexed

[245] Charles Chernor Jalloh, (n 188), para 17 at 312.
[246] Ibid.

to the ILC's 2018 report.[247] In this regard, it was stressed the time is ripe for the ILC to work on determining the scope and definition of UJ. Based on vagueness in the definition of and issues connected to the principle of universality, when this principle has been applied, it has at times led to tensions between states. Thus, it was concluded that this principle should be considered by the ILC within its working programme as an area for development with the potential to make its application clearer and thus promote the international rule of law.[248]

It is worth mentioning that in 1996, the ILC set legal criteria for placing any topic on their long-term programme of work which include the follow:

> *(a) The topic should reflect the needs of States in respect of the progressive development and codification of international law; (b) The topic should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification; (c) The topic is concrete and feasible for progressive development and codification; In this regard, in the selection of new topics, the Commission should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole.* [249]

Accordingly, the research in the following sub-section will examine whether or not these criteria have been met in UJ. In general, it can be concluded that UJ has not yet been discussed in detail by the ILC. However, it was observed that the issue of exercising UJ was discussed by the ILC when it was working on the DCCAPSM.[250] Indeed, UJ was discussed as a legal procedure to apply the DCCAPSM.[251] On the other hand, in 2006 the ILC discussed the subject of extraterritorial jurisdiction, which is exercised for the interests of the State over acts that occurred outside its territory and the scope of this study includes commercial and criminal matters. In fact, it is contrary to UJ which is exercised on behalf of the international community and over the most serious international crimes.

6.3.3: The Inclusion of 'UJ' in the ILC's Long-term Programme of Work

As noted above, in order to be included within the long-term working programme of the ILC, an issue must fulfil the stipulations below (set in 1996) which includes the following: (1) The subject must address state requirements in terms of developing and codifying international

[247] Report of the ILC, (n 6), para 37, p 9.
[248] Charles Chernor Jalloh, (n 188), para 17 at 312.
[249] Yearbook of the ILC 1997 (n 7), para. 238.
[250] DCCAPSM, (n 72). See also Yearbook of the ILC 1988, (n 233) para 15.
[251] Yearbook of the ILC 1996, (n 238) at 28.-30.

laws; (2) It must have progressed already to the extent that it is possible to further develop and codify it; (3) Feasibility and concreteness must be demonstrated; and (4) The topic does not need to have been historically considered by the ILC: in fact, any topic reflecting the evolution of international law can be considered: particularly where the topic is of urgent concern to the international community.[252] Accordingly, this section addresses the applicability of these criteria to UJ.

6.3.3.1. A Legal Study on UJ Stems from States' Requirements

As previously outlined, UJ has been debated by the Sixth Committee since 2009, but progression on this topic has been slight, with the committee concluding only that responsibility and 'judicious application' of UJ, in line with international law, is the most effective means of maintaining the principle as a credible and legitimate power.[253] Considering this, it is legitimate to ask what is meant by judicious application, as well as what is required in order to be consistent with international law. As the Sixth Committee recognised that it had not achieved significant forward movement on this issue, a working group was suggested in which each member state could take part, which would allow the debate to take place less formally in the expectation that this would reduce conflict in viewpoints.[254] This group has led to minor developments regarding the topic, however, the differences noted more broadly between states in the UNGA and Sixth Committee were also seen in the working group, and therefore, a decision was taken to state that proceedings and decisions here should not prejudice the discussion of UJ and linked areas within the UN's other groups or assemblies.[255] Thus, space was left for engagement on this topic by any body of the UN with an involvement in the issue, including the ILC, as it falls within their mandate.

In this regard, it was argued that if the ILC undertook a legal study on UJ, the Sixth Committee might consider that this would empower the UNGA to develop further clarity on the status of universality in international law, or failing that, the status of a number of aspects of this

[252] Yearbook of the ILC 1997 (n 7), para. 238. See also Charles Chernor Jalloh, (n 188), at 313.
[253] Charles Chernor Jalloh, (n 188), at 314.
[254] United Nations, 72nd Session, (n 4). See also African Union, (n 189).
[255] UNGA Resolution, 65th session, Agenda item 86, Resolution adopted by the General Assembly on 6 December 2010 [on the report of the Sixth Committee (A/65/474)] Doc. No. A/RES/65/33 (10 January 2011).

topic.[256] Furthermore, if the ILC provided this, the current New York discussion could change focus to dealing with the concerns put forward by States regarding the possible misuse or abuse of UJ. This action may also assist in the development of practical proposals based on the studied practices of States to provide better legal grounds to reach a negotiated agreement where there is not agreement in the Assembly. The role of the ILC, which is a secondary and technically focused institution, allows it to perform a legal study on the principle of universality within the international legal system. Such an analysis could assist in improving the application of UJ to avoid the impunity which exists in some areas at present and impedes the legal pursuance of those who commit serious crime undertaken in the international community. It could also offer certainties in international law, for the assistance of states and their national level bodies, such as courts.

6.3.3.2. This Topic Shows Adequate Advancement in the Practice of States to Allow it to be Developed and Codified

Despite the uncertainty in relation to the scope of UJ, various States have existing legislation which allows for UJ to be applied, in line with specific treaty obligation. Thus, the Secretary-General has received a great deal of documentation from States, with the Sixth Committee's Secretariat submitting multiple reports to the UNGA, informing debates regarding this issue. This is in addition to municipal law and a number of international conventions which allow *aut dedere aut judicare* obligations, as connected to UJ but which may or may not have the same parameters.[257] There is an expectation of a type of UJ in the national legislation of certain states for delimited and severe types of crime in international law, irrespective of whether these crimes are linked to the state territorially or the individuals involved. As investigative work and the number of prosecutions in this area grow, an adequate body of state practice has built up over a wide area and showing progression, which means that it would be possible to progressively develop and codify law on this topic.[258]

[256] Charles Chernor Jalloh, (n 188), at 313.
[257] e.g. International Committee of the Red Cross (ICRC), Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31, art 49; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, art 5(2).
[258] Charles Chernor Jalloh, (n 188), at 314.

The basis for considering that this type of study would add benefit is based on several factors. First is the multiple debates related to UJ which have been held by the Sixth Committee since 2009. Second is the extensive range of materials on legislation, executive and judicial data received from groups and individuals which document state practice in this area.[259] Moreover, there exist numerous in-depth reports from the Secretary General for the assistance of states to construct debate in the Sixth Committee on the topic.[260] Finally, resolutions have been made on UJ on a yearly basis by the UNGA.[261] In addressing the potential concerns which may arise if this topic is developed for study, as it is currently under consideration of the Sixth Committee, it is important to note that each resolution of the UNGA has highlighted its intention to debate the topic without prejudicing assessments or discussions carried out by other UN bodies when considering the scope of the principle and how it should be applied. As the ILC is a secondary part of the UNGA, it falls within this category of bodies. Moreover, states from widespread locations have repeatedly called for the transfer of this issue from debate within the Sixth Committee to the ILC, due to the technical issues involved, which call for greater clarity through legal study.

6.3.3.3. UJ as a Viable, Distinct Topic for Study

The feasibility and concrete character of UJ as a study topic is clear, with adequate evidence of practice among states to allow this to be codified. Moreover, the controversial nature of this practice means that codifying and progressively developing scope in this area can be regarded as essential. As discussed previously, almost a decade of evidence has been collected on the practice of states, doctrine and precedent, which can be used to help in codifying this area. Simultaneously, debates have been held during this time by the Sixth committee to consider the principle's applications and scope, which leaves the topic in an

[259] Ibid.

[260] Reports of the UN Secretary-General, The Scope and application of the principle of universal jurisdiction, U.N. Doc. A/65/181 (July 29, 2010); U.N. Doc. A/66/93 (June 20, 2011); U.N. Doc. A/66/93/Add. 1 (June 20, 2011); U.N. Doc. A/67/116 (June 28, 2012); U.N. Doc. A/68/113 (June 26, 2013); U.N. Doc. A/69/174 (July 23, 2014); U.N. Doc. A/70/136 (July 14, 2015); U.N. Doc. A/71/111 (June 28, 2016); U.N. Doc. A/72/112 (June 22, 2017); U.N. Doc. A/73/123 (July 3, 2018); and U.N.Doc. A/74/144 (July 11, 2019).

[261] UNGA Resolution. A/RES/64/117 (Jan. 15, 2010); UNGA Resolution. A/RES/65/33 (Jan. 10, 2011); UNGA Resolution. A/RES/66/103 (Jan. 13, 2012); UNGA Resolution. A/RES/67/98 (Jan. 14, 2013); UNGA Resolution. A/RES/68/117 (Dec. 18, 2013); UNGA Resolution. A/RES/69/124 (Dec. 18, 2014); UNGA Resolution. A/RES/70/119 (Dec. 18, 2015); UNGA Resolution. A/RES/71/149 (Dec. 20, 2016); UNGA Resolution. A/RES/72/120 (Dec. 18, 2017); UNGA Resolution. A/RES/73/208 (January. 14, 2019).

arguably unusual condition. As state responses to surveys by the ILC are sparse, the availability of the data already gathered provides a large body of evidence for use by the ILC to inform its analysis.[262]

Furthermore, the feasibility of this study is enhanced by the wealth of state-ratified conventions which currently demand prohibition of particular behaviours, with national legislation to broaden the jurisdiction over these criminal activities. Case law related to UJ in multiple jurisdictions currently exists,[263] and additionally there is various academic literature and region-wide tools in this area. Among these are the Cairo-Arusha Principles on UJ, the Princeton Principles on UJ, and the African Union Model Law on UJ.[264] Additionally, while it is not considered that overlaps exist, which would justify widening this scope, a number of current or recent topics investigated by the ILC could provide insight to support the clarification of UJ as a principle.[265]

6.3.3.4. The Topic of UJ as Both Contemporary and Traditional

The study of UJ will allow the ILC to examine an issue that has both contemporary and traditional importance. In this matter, it was observed that the study of UJ is timely as the significance of assigning criminal responsibility to individuals for international crime has been growing for at least three decades. This means that through this topic, the ILC would be addressing not only historical concerns but present concerns shared by states and the international community, giving the potential to help in practice. Furthermore, the ILC could use this concept for the development of older concerns, including jurisdiction in general. International law represents the combination of older and emerging concerns, and this study

[262] Charles Chernor Jalloh, (n 188), at 315.

[263] e.g. Arrest Warrant Case, (n 21) pp 70; Attorney-General of Israel v Adolf Eichmann (District Court, Jerusalem) Case No. 40/61, 15 January 1961, 36 ILR 5. Attorney-General of Israel v Adolf Eichmann (Supreme Court of Israel) Case No. 336/61, 29 May 1962, 36 ILR; Khaled Ben Said v. France, Decision date 24 September 2010, (The Criminal Court of Nancy, France) available at <https://trialinternational.org/latest-post/khaled-ben-said/#section-2> (accessed 18/7/2018); National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another Constitutional Court of South Africa CCT 02/14 Date of judgment:30 October 2014.

[264] Report of the ILA, (n 13); The Princeton Principles on Universal Jurisdiction, (n 26); Cairo Principles, (n 108); Institute of International Law Resolution, (n 14); African Union Model, (n 127).

[265] International Law Commission, (n 46); International Law Commission, (n 209); Yearbook of the ILC 2014, (n 207) 91-92.

reflects that. Moreover, it could engage the ILC more actively in areas showing the progression of human rights through international law. That those individuals and groups who have suffered atrocities may access justice in some way is supported as a priority of older draft work to codify crimes, and in newer work drafting statute to allow a continuous international court, related to crimes against humanity and related subjects.[266]

6.4: Desired and Potential Outcomes of the Codification

6.4.1: Key Issues that the ILC should Focus on in any Future Study of UJ

The study's scope can be set taking into account the previous discussion of states within the Sixth Committee, which highlighted the wide range of disagreement between States that published in the aforementioned informal paper.[267] Based on this, it may not be beneficial to target a comprehensive approach which seeks to address each issue of concern or lack of clarity for states, preferring instead to focus upon a defined list of legal issues and developing guidelines for these issues based on close working with the Sixth Committee.[268] The following are the most important points that should be considered the ILC when working on codifying UJ. They also include a summary of the opinion of this research on these points.

6.4.1.1: Determining a Clear Definition of UJ and Its Basic Elements

Firstly, the study could usefully set out to define UJ at a foundational level, clarify its aims and roles, categorise different forms of this jurisdiction and identify in state practice the circumstances and conditions for applying this concept. For example, the study may consider whether the capacity or tendency to apply the principle only where the investigated crime or party is within its territorial boundaries. It may also identify legal grounds for jurisdiction claims within international law, based on custom and treaty, as well as considering the basis for decisions over prosecution as being permitted or at the state's discretion, or whether it is an obligation.[269]

It is worth mentioning that previous attempts to codify UJ either lacked a definition of UJ or the definition did not effectively clarify the main elements of such jurisdiction and for this reason it was not widely accepted. For instance, Princeton's definition of UJ was criticised

[266] Charles Chernor Jalloh, (n 188), para 25, at 315-316.
[267] Sixth Committee of the GAUN, informal working paper, (n 187).
[268] Charles Chernor Jalloh, (n 188), para 26, at 316.
[269] Ibid.

because it is very broad, and its legal elements are not clear, so it cannot satisfy the legal certainty required in criminal law.[270] In this matter, Reydams stated that "The definition is very broad and leaves so much undefined that one must wonder how it can satisfy the requirement of legal certainty in criminal law".[271] Additionally, the 2005 resolution of the International Law Institute provided an arguably poor and unclear definition of UJ.[272] In this matter, Kreb said that "[a]lthough the Resolution has not completely shied away from defining UJ, the approach chosen is so modest".[273] On the other hand, it was observed that some previous attempts avoided providing a definition of UJ, for example, the African Union Model Law on UJ (2012) had avoided defining UJ.[274]

Accordingly, the issue of determining the definition of UJ has been given significant attention in Chapter 3. In this matter, it was observed that the above-mentioned definitions are general and do not include stating important elements about UJ, such as whether it is conditional or absolute criminal jurisdiction, or whether it is primary criminal jurisdiction or it is exercised in subsidiarity manner.[275] Thus, it was argued that UJ lacks a generally accepted definition under customary or conventional international law.[276]

Therefore, the main elements of UJ have been drawn from various definitions which could be addressed as follows. Firstly, UJ is an exception to traditional forms of jurisdiction.[277] This is due to the fact that UJ does not require any traditional links such as nationality or territory to be exercised. The second element of UJ is the exceptional nature of its legal scope, which is supposed to be exercised over a limited number of crimes which are classified as a violation of *jus cogens* under international law. In addition, these crimes are characterised by the nature of the commission or by the serious violations caused.[278] For instance, the crime of

[270] Luc Reydams, (n 59), 6.
[271] Ibid.
[272] Institute of International Law Resolution, (n 14), para 1 states that ''Universal jurisdiction in criminal matters, as an additional ground of jurisdiction, means the competence of a State to prosecute alleged offenders and to punish them if convicted, irrespective of the place of commission of the crime and regardless of any link of active or passive nationality, or other grounds of jurisdiction recognized by international law''.
[273] Claus Kreb, (n 14) 563.
[274] African Union Model, (n 127).
[275] Luc Reydams, (n 59) 1. See also Dalila Hoover, (n 48) 82; Gabriel Bottini, (n 20) 511.
[276] Arrest Warrant Case, (n 21), (Dissenting opinion of judge van den wyngaert) ICJ, para 44; Mark A. Summers, (n 55) 89; Luc Reydams, (n 59) 6.
[277] Eberechi Ifeonu, *An Imperial Beast of Different Species or International Justice? Universal Jurisdiction And The African Union'S Opposition*, (PhD Thesis University Of British Columbia 2015)163.
[278] Ibid, 161; Sienho Yee (n 3) 504-505.

piracy is recognised as falling under UJ because it is usually committed on the high sea where no state exercises sovereignty.[279] In addition, War crimes are subject to UJ, in view of the gravity, seriousness and consequences for the international community as a whole.[280] Such crimes are criminalised by international law and allow every State to exercise UJ over such crimes.[281] The third element of UJ is the absence of an effective jurisdiction that should be exercised.[282] In fact, UJ is a secondary mechanism which should be exercised only if the national and territorial States are unwilling or unable to exercise their criminal jurisdiction over international crimes.[283] Finally, UJ is not an absolute criminal jurisdiction, rather it is conditioned by the presence of the accused in the territory of the state that will exercise UJ.[284] Based on the these elements, the research in Chapter 3 suggested that UJ should be defined as follows: it is the exclusive criminal jurisdiction that can be exercised over those accused of committing a certain number of international crimes by national courts of any State on whose territory the accused is present, especially in the absence of an effective jurisdiction.

6.4.1.2: Determining the Scope of the Exercise of UJ and its Relationship to Traditional Jurisdictions

Secondly the study should pay attention to determining the parameters and scope of UJ, possibly including the preparation of an illustrative list of criminal actions that could fall within this jurisdiction. For example, the study could explore how UJ can be deduced from state practice for crimes against humanity, genocide, and war crimes. It may also be beneficial to explore points of state-state conflict that could emerge, such as dispute resolution where more than one state asserts jurisdiction, which may happen where jurisdictions are concurrent.[285]

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[279] Petra Baumruk (n 3) 42-48. See also, Tamsin Paige, 'Piracy and Universal Jurisdiction', (2013) 12 Macquarie Law Journal 131, 144.
[280] Roger O'Keefe, (n 37) 812.
[281] Claus Kreb, (n 14),63-64.
[282] Xavier Philippe, 'The principles of universal jurisdiction and complementarity: how do the two principles intermesh?', (2006) 88 International Review of the Red Cross 375, 379. See also, Cedric Ryngaert, 'The Concept of Jurisdiction in International Law', in Alexander Orakhelashvili (eds), *Research Handbooks in International Law Series*, (Edward Elgar Publishing Ltd, 2015) 65.
[283] Claus Kreb, (n 14) 580. See also Fannie Lafontaine, (n 136) 1286.
[284] Report of the UN Secretary-General, The scope and application of the principle of universal jurisdiction, Sixty-ninth session, UN. Doc. No. A/69/174 (23 July 2014).
[285] Charles Chernor Jalloh, (n 188), para 28, at 316.

The opinion of the research in this regard has been discussed in the third and fourth Chapters. In this matter, the research in Chapter 3 examined the international crimes subject to UJ.[286] Additionally, Chapter 4 discussed the state practice of UJ and extracted from it the crimes covered by such jurisdiction. Accordingly, the research reached the conclusion that the crimes subject to UJ are limited to the crime of piracy, slavery, war crimes, genocide, crimes against humanity and torture. The common factor among the above-mentioned crimes is that such crimes constitute a violation of *jus cogens*. In fact, this violation generates an international obligation toward all States to take the necessary legal procedures against the perpetrators of these crimes.[287] In this matter, State practice has shown that UJ is considered a form of fulfilment of this obligation if the accused is present in the territory of the state.

With regard to defining the relationship between UJ and the traditional criminal jurisdiction, the fourth chapter concluded that the practice of states showed that UJ is conditional on being exercised in a subsidiary manner,[288] which means that UJ will be exercised only if the State in which the crimes are committed or the State in which the accused are national is unwilling or unable to prosecute the accused.[289] This is due to the fact that when international crimes are committed, priority is given to criminal jurisdiction based on traditional grounds such as territorial jurisdiction. This is because the state where the crime is committed has the greatest ability to prosecute the crime, examine witnesses, collect evidence and capture the offender.[290] Accordingly, UJ is allowed to be exercised in the absence of an effective traditional criminal jurisdiction.[291]

Chapter 4 discussed another important issue, which is the issue of exercising UJ over holders of diplomatic immunities. In this matter, the research concluded that the diplomatic immunity issue was and remains one of the most important legal dilemmas facing the exercise of UJ by national courts. This is due to the fact that the international crimes which can be subject to UJ are often committed by government officials or persons with a recognised official

[286] Sienho Yee (n 3) 504.
[287] Rubin Alfred, 'Actio popularis, jus cogens and offenses erga omnes?', (2001) 35 New England Law Review 265, 277-278; Roger O'Keefe, (n 37) 811-812; Mahmoud Cherif Bassiouni, 'International Crimes: Jus Cogens and Obligatio Erga Omnes', (1996) 59 Law and Contemporary Problems 63, 63.
[288] ZHU Lijiang, (n 95) 217.
[289] Report of the UN Secretary-General, (n 38) para 155. See also Luc Reydams, (n 59) 7.
[290] Petra Baumruk (n 3) 23.
[291] Ibid.

capacity.[292] However, such persons enjoy diplomatic immunity under international law.[293] In this matter, it was argued that immunity is not granted to a person per se but to his or her status as representative of the State to carry out the duties entrusted to them.[294] Thus, UJ cannot be exercised over persons who have diplomatic immunity unless their States waive the right of immunity. Consequently, it was observed that most states have stressed that the exercise of UJ by national courts is conditional on the need to respect diplomatic immunity.[295]

6.4.1.3: Determining the Relationship between UJ and other International Mechanisms to Combat Impunity

Considering the relation between the principle of universality and international tribunals and courts, with the potential for intersectionality, this legal analysis might be extended to cover identifying conclusions and guidance for the avoidance of conflict between the jurisdiction of the ICC, use of UJ by signatories to the Rome Statute, and application of UJ by any state where the Security Council refers case to the ICC in which non-party states are involved, as well as where further international criminal tribunals are convened. In-depth analysis will be beneficial in terms of increasing certainties around relations between national and international applications, such as international tribunals, where overlaps might occur for certain basic international criminal acts. Within this is both the principle of complementarity and prosecution and extraditions obligations.[296]

In this context, the research in the fifth chapter discussed the emergence of international courts and their relationship to the principle of UJ. Indeed, it was remarked that the principle of UJ has not been granted to any international courts yet.[297] Additionally, it was observed that the jurisdiction of international criminal courts is called an international criminal

[292] Ademola Abass, 'The International Criminal Court and Universal Jurisdiction', (2006) 6 International Criminal Law Review 349, 370.
[293] Report of the International Law Commission, (n 62) p. 436.
[294] See Arrest Warrant Case in Summaries of Judgments, Advisory Opinions and Orders of The ICJ (1997-2002), (n 88), p. 212.
[295] Report of the UN Secretary-General, (n 38). See also ZHU Lijiang, (n 95) 218.
[296] Charles Chernor Jalloh, (n 188), para 29, at 316.
[297] Bernhard Graefrath, (n 234) 69.

jurisdiction, which works in parallel with UJ, which is exercised by national courts to bridge the impunity gap.[298]

It is worth highlighting that the importance of the relationship of cooperation between the two jurisdictions was stressed to bridge the impunity gap.[299] This is due to the fact that it would be impossible for an international criminal court alone to try and punish the huge number of offenders who have allegedly committed international crimes,[300] not only because of the number of crimes that have been committed recently, but also as these kinds of crimes are usually committed as part of a general policy that involves large numbers of participants.[301]

In fact, this point of view has been stressed since 1983 by some members of the ILC who have expressed their fears of relying on only the implementation of UJ by national courts over the crime against the peace and security of mankind.[302] Therefore, the ILC recommended that a combined approach to jurisdiction based on the possible jurisdiction of an international criminal court, together with the implementation of UJ by national courts, is required for effective implementation to DCCAPSM.[303] It is clear that this point of view confirms the importance of integration relationship between the two jurisdictions to combat impunity.

An example of the integration of the relationship between the two jurisdictions and its role in combating impunity was observed after the Security Council issued resolutions 827 and 955, establishing the two international tribunals for Yugoslavia and Rwanda. French law was passed permitting the exercise of UJ over perpetrators of international crimes in these two countries. Indeed, the goal of French law was an integral role for the two international tribunals and for bridging the impunity gap, especially for cases brought before the French judiciary.[304] This was noted in the case of *Javor et autres*, in which the French judiciary was

[298] Gabriel Bottini, (n 20) 513.
[299] Jo Stigen, (n 169) 133.
[300] Kevin Jon Heller, (n 237) 17.
[301] Yearbook of the ILC 1996, (n 238), 28.
[302] Yearbook of the ILC 1983, (n 239) para. 22; Yearbook of the ILC 1986, (n 238) para. 32. See also Bernhard Graefrath, (n 234) 78.
[303] Bernhard Graefrath, (n 234) 72. See also Yearbook of the ILC 1996, (n 238) 28.-30
[304] Law No. 95-1 of 2 January 1995 adapting French legislation to the provisions of United Nations Security Council Resolution 827 establishing an international tribunal to try persons alleged to be responsible for serious violations of international humanitarian law committed on the territory of the former Yugoslavia since 1991.

unable to exercise jurisdiction in the absence of legislation authorising the exercise of UJ over crimes committed in Yugoslavia.[305] It is clear that UJ aims to complement international criminal jurisdiction in bridging the impunity gap, and vice versa.

It was also noted that the ICC statute confirmed the complementary role of the ICC to criminal jurisdictions exercised by national courts. In this matter, Article 1 of the Rome Statute affirmed that the jurisdiction of the ICC is complementary to that of national criminal jurisdictions.[306] This provision is confirmed by Article 17, which provides that the ICC will not dispute the issue of jurisdiction and will not demand to exercise its jurisdiction, unless the custody state is unable or unwilling to exercise criminal jurisdiction.[307]

It is worth noting that Article 17 did not clearly state that the jurisdiction of the ICC is complementary to UJ exercised by national courts.[308] This is due to the fact that the Rome Statute used the term "national criminal jurisdictions" without specifying the type of jurisdiction, whether it is based on traditional links of criminal jurisdiction or the principle of universality.[309] For instance, the preamble of the Rome statute emphasised that "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions".[310] Additionally, Article 17 when clarifying the mechanism of the principle of complementarity work, used a general term to describe the jurisdiction of the state, which is " State which has jurisdiction".[311]

NOR: JUSX9500141L, consolidated version on 13 July 2001. Available at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000742868; Law No. 96-432 of 22 May 1996 adapting French legislation to the provisions of United Nations Security Council Resolution 955 establishing an international tribunal to try persons presumed responsible for genocide or other acts serious violations of international humanitarian law committed in 1994 in the territory of Rwanda and, in the case of Rwandan citizens, on the territory of neighbouring States NOR: JUSX9500141L, consolidated version on 13 July 2001. Available at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000742868. See also Report of the UN Secretary-General, (n 38).

[305] Javor et al., Order of Tribunal de grande instance de Paris, (n 40).

[306] Rome Statute, (n 52) art 1.

[307] Ibid, art 17.

[308] Sharon A. Williams and William A. Schabas, 'Article 12 (Preconditions to the exercise of jurisdiction', in Otto Triffterer (ed.), *The Rome Statute of the International Criminal Court: Observers" Notes, Article by Article*, (2nd edn., Hart, 2008), 550-553.

[309] Christopher K. Hall, 'The Role of Universal Jurisdiction in the International Criminal Court Complementarity System', in Morten Bergsmo (ed), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 207.

[310] Rome Statute, (n 52) preamble.

[311] Rome Statute, (n 52) art. 17.

However, in this regard, it was argued that "when the term "jurisdiction" of states is used in the Rome Statute, it means jurisdiction permitted or required under international law, including universal jurisdiction".[312] The research supports this point of view as UJ is an internationally recognised principle and one of the internationally recognised criminal jurisdictions.[313] As noted in the previous chapters, national criminal jurisdictions could be based on the traditional links of criminal jurisdiction or the universality principle if the accused of committing international crimes appears in the territory of a state.[314] Thus, the research argues that the term national criminal jurisdiction, which is used in the Rome Statute, includes UJ.[315]

To date, there is no case in which UJ has been exercised in parallel with the practice of the ICC jurisdiction, with the exception of the current case of the Rohingya people in Myanmar.[316] The facts of this case are that a significant number of the Rohingya Muslims people in the State of Myanmar have been subject of genocide and crimes against humanity since 25 August 2017.[317] As a result, Bangladesh requested the ICC to open a criminal investigation into these alleged crimes, because Bangladesh is a state party to the court and that most victims of this crime have fled towards Bangladesh.[318] On 14 November 2019, the ICC Prosecutor was authorised by Pre-Trial Chamber III of the ICC to open an investigation for the alleged crimes.[319]

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[312] Christopher K. Hall, (n 309) 207.

[313] Mahmoud Cherif Bassiouni, (n 18) 135; Charles Kotuby and Luke Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes*, (1st edn Oxford University Press, 2017) 164.

[314] Anthony J. Colangelo, 'The Legal Limits of Universal Jurisdiction', (2006) 47 Virginia journal of international law 149, 150.

[315] Louise Arbour, 'Will the ICC have an Impact on Universal Jurisdiction?', (2003) 1 Journal of International Criminal Justice 585, 587. See also Christopher K. Hall, (n 309) 207.

[316] Marta Bo, Crimes against the Rohingya: ICC Jurisdiction, Universal Jurisdiction in Argentina, and the Principle of Complementarity, Opinio Juris Website, December 23, 2019, available at http://opiniojuris.org/2019/12/23/crimes-against-the-rohingya-icc-jurisdiction-universal-jurisdiction-in-argentina-and-the-principle-of-complementarity/ (accessed 27 June 2020).

[317] United Nations Human Rights Council, Report of the independent international fact-finding mission on Myanmar, UN. Doc. No. (A/HRC/42/50) 8 August 2019, para 23, at 6.

[318] The ICC, Pre-Trial Chamber III, Decision on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC. Doc. No. (ICC-01/19-27 14-11-2019 1/58 NM PT) 14 November 2019, para 1-2, at 4.

[319] The ICC, Pre-Trial Chamber III, Decision on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC. Doc. No. (ICC-01/19-27 14-11-2019 1/58 NM PT) 14 November 2019, para 1-2, at 4. See also The ICC, Pre-Trial Chamber I, Jurisdiction Decision, ICC. Doc. No. (ICC-RoC46(3)-01/18-37 06-09-2018 1/50 RH PT) 6 September 2018, para 73, at 42.

In another aspect of justice, on 13 November 2019, a criminal case was filed before the Argentinian judiciary against the perpetrators of these crimes in Myanmar based on the principle of UJ.[320] Nevertheless, the Argentinian court of the first instance initially dismissed the case, in December 2019, arguing that the investigation has already launched by the ICC.[321] The decision to dismiss the case, however, was appealed, on 29 May 2020, the Federal Appeals Court in Buenos Aires overturned the decision. In this matter, it was mentioned that ''the Court ruled that it is necessary to approach the ICC for more information about its case against Myanmar through a formal diplomatic note, before making a final decision on whether to open an investigation in Argentina''.[322] Accordingly, if the Argentinian judiciary continues to hear the case of Rohingya, it will be the first time that international crimes are prosecuted on the basis of UJ in parallel with the ICC prosecution.[323]

However, the research believes that the Argentinian experience could not be an ideal model for assessing the complementarity relationship between the ICC jurisdiction with the exercise of UJ. This is because the Argentinian practice of UJ is marred by ambiguity and lack of clarity, as it allows the exercise of UJ in absentia. Indeed, such practice in absentia is doubtful and not recognised internationally.[324] On the other hand, Argentina does not have national legislation that regulates the UJ and defines its scope and conditions. As mentioned in chapter four, Argentina to exercise UJ relies on the constitutional provisions stipulating that the provisions of ratified conventions are part of Argentinian law.[325] However, such an approach is problematic because there is no international convention that has regulated the practice of UJ and determined the scope of its application directly.

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[320] Buenos Aires court of the first instance, (Burmese Rohingya Organisation UK (BROUK) and others V Myanmar authority), 13 November 2019; The Federal Appeals Court in Buenos Aires, decision on 29 May 2020.
[321] Ibid.
[322] Ibid. Burmese Rohingya Organisation UK (BROUK), Argentinean judiciary moves closer to opening case against Myanmar over Rohingya genocide, 1st June 2020, available at https://progressivevoicemyanmar.org/2020/06/01/argentinean-judiciary-moves-closer-to-opening-case-against-myanmar-over-rohingya-genocide/ (accessed 27 June 2020)
[323] Marta Bo, Crimes against the Rohingya: ICC Jurisdiction, Universal Jurisdiction in Argentina, and the Principle of Complementarity, Opinio Juris Website, December 23, 2019, available at http://opiniojuris.org/2019/12/23/crimes-against-the-rohingya-icc-jurisdiction-universal-jurisdiction-in-argentina-and-the-principle-of-complementarity/ (accessed 27 June 2020).
[324] Dissenting opinion of Judge van den Wyngaert, ICJ, para 57-58, p30. Arrest Warrant Case, 11 April 2000 (Democratic Republic of Congo v.Belgium), Judgment,Feb. 14, 2002); Laura Íñigo Álvarez, Challenges of universal jurisdiction: the Argentinian Complaint against Franco-era crimes and the lack of cooperation of the Spanish judicial authorities, (Blog van het Utrecht Centre for Accountability and Liability Law, 3 June 2019).
[325] Constitution of the Republic of Argentina, 1853 (Re 1983, revision 1994). Constitute. Retrieved 2 March 2015, art 75(22), art 118; Report of the UN Secretary-General, The Scope and Application of the Principle of Universal Jurisdiction, Seventy-third session, UN. Doc. No A/73/123 (July 3, 2018) para 6, at 2. See also Law on the Implementation of the Rome Statute of the International Criminal Court, 2007, Ley núm. 26.200 [enero 5 de 2007]: Ley de implementación del Estatuto de Roma de la Corte Penal Internacional.

Therefore, the absence of legislation governing UJ could be an obstacle due to the fact that states cannot rely on the texts of international conventions alone in applying UJ.[326] Accordingly, the research believes that the Argentinian judiciary might not continue hearing the Rohingya case due to the investigation that has been already launched by the ICC. In addition, the absence of victims or accused persons on Argentinian soil, which may make it difficult for the court to reach the truth and conduct a fair trial. Therefore, the role of the ICC in this case could be more effective in reaching truth and achieving justice, as the court is able to reach a large number of victims on the Bangladeshi soil, the state party to the court.

In general, it can be concluded that according to the Rome Statute the ICC jurisdiction should be complementary to criminal jurisdictions exercising by the national courts including UJ. Despite that, the Argentinian use of UJ in the case of Rohingya could not be an ideal model for assessing the complementarity relationship between the ICC jurisdiction with the exercise of UJ. This is because the Argentinian practice of UJ is marred by ambiguity and lack of clarity, as it allows the exercise of UJ in absentia.

6.4.2: Possible Outcome of Codification

Following the discussion of the most important points that should be considered by the ILC when codifying UJ, the question that arises is what form the ILC can choose for codifying UJ. Indeed, the statute of the ILC did not specify a form for its outputs but rather left the matter open for the ILC to choose the most appropriate one. In this matter, Article 23 (1) stated that "The Commission may recommend to the General Assembly: (a) To take no action, the report having already been published; (b) To take note of or adopt the report by resolution; (c) To recommend the draft to Members with a view to the conclusion of a convention; (d) To convoke a conference to conclude a convention".[327] In fact, there is more than one possible form for the ILC's products that mainly includes treaties and non-treaties. The former includes draft treaties, while the latter includes guidelines, studies, reports, conclusions, principles, model rules in the form of draft articles, declarations and so forth.[328]

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[326] e.g, see Javor et al., Order of Tribunal de grande instance de Paris, 6 May 1994; upheld on appeal by the Paris Court of Appeal, 24 October 1994 and by the Court of Cassation, Criminal Chamber, on 26 March 1996; Dupaquier et al., Order of Tribunal de grande instance de Paris, 23 February 1995.See also Fannie Lafontaine, (n 136), 1283.

[327] Statute of the ILC, (n 215) art 23.

[328] Sean Murphy, 'Codification, Progressive Development, or Scholarly Analysis? The Art of Packaging the ILC's Work Product', in Maurizio Ragazzi (ed), *The Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie*, (Martinus Nijhoff Publishers 2013) 29. See also Abdualbaset Alfaidi, (n 203) 26-27.

Traditionally, the format of the treaty was considered the best form of output for the ILC.[329] In this regard, the commission expected in 1971 that "in the years ahead the codification of conventions will continue to be considered as the most effective means of carrying on the work of codification".[330] This point of view has also been emphasised in a number of legal writings. For example, the treaty form that had been produced by the ILC was described by Jennings and Watts as "a major contribution to the development of a significant portion of international law, therefore, for that alone the work of the ILC can be regarded as successful".[331] This is because treaties become binding rules of international law and generally prevail over custom. Additionally, Ramcharan in his book, citing the opinion of Reuter, claims that "among the various kinds of work that the ILC has undertaken or might undertake the most important and useful, and has established the authority of the ILC more effectively than any other, was the preparation of draft articles to provide the raw material for international conventions".[332] It is worth noting that the drafting of a significant number of international treaties was produced by the ILC, such as draft articles on the Law of Treaties with commentaries of 1966, as well as, the 1994 draft statute to establish an international criminal court on a permanent basis.[333]

However, the treaty form as the main type of ILC's output has been criticized because of it can fail or be delayed in coming into force.[334] Ramcharan claimed that the codification of a treaty "takes a long time to hammer out in the ILC and a codification conference which means that only a few conventions can be concluded over a twenty-five-year period".[335] Furthermore, it was argued that the international community may not always agree with the

[329] Luke Lee, 'International Law Commission Re-Examined', (1965) 59 American Journal of International law 546, 546; Robert Jennings, 'Recent Developments in the International Law Commission: Its Relation to the Sources of International Law', (1964) 13 (2) International and Comparative Law Quarterly 385.
[330] Yearbook of the ILC 1973, vol. II, Report of the International Law Commission, Twenty-Fifth Session 1973 Doc. No. (A/9010/Rev.1), 230.
[331] Robert Jennings and Arthur Watts, Oppenheim's International Law: Volume 1 Peace: Introduction and Part 1 (9th edn, Longman 1992) 30.
[332] Bertrand Ramcharan, *The International Law Commission: Its Approach to the Codification and Progressive Development of International Law* (Martinus Nijhoff Publishers 1977) 75.
[333] Yearbook of the ILC 1966, (n 213). See also Draft Statute for ICC, (n 200).
[334] Abdualbaset Alfaidi, (n 203) 29. See also Report of the International Law Commission, (n 119) para 232-233, at 115 -116.
[335] Bertrand Ramcharan, (n 332) 21.

ILC on the need or possibility of a multilateral treaty on a specific subject.[336] Consequently, the form of the draft treaty may not be the best product for the work of the ILC. The following are the most prominent examples of agreements that did not enter into force or entered into force after a long delay: firstly, treaties not yet entered in force include the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts on 8 April 1983,[337] and the UN Convention on Jurisdictional Immunities of States and Their Property on 2 December 2004.[338] Secondly, treaties that entered into force after a long delay include the Convention on the Law of the Non-Navigational Uses of International Watercourses of 1997, which entered into force on the 17th of August 2014.[339] In fact, since the beginning of the 1970s, this issue was on the ILC's agenda, however, this convention entered into force in 2014.

Due to the problems surrounding the treaty form, the use of the treaty form has been reduced and attention has shifted to the non-treaty form, which is known as soft law instruments, which includes guidelines, studies, reports, conclusions, principles, model rules, and declarations.[340] In fact, the work of the ILC on the topic of State responsibility is one of the most prominent examples of the shift from a treaty form to a non-treaty form.[341] Here, the UN avoided putting forward a treaty on state responsibility as they merely adopted a resolution which was annexed by the draft articles of the ILC on state responsibility.[342] This was due to the fact that it was unlikely that any treaty on state responsibility would be

[336] Mohamed El Baradei, Thomas Frank and Robert Trachtenberg, 'The International Law Commission: The Need for A New Direction', (1981) 1 United Nations Institute for Training and Research 1, 27.
[337] This Convention requires ratification of 15 countries to enter into force, but it has only been ratified by 7 countries. See https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-12&chapter=3&clang=_en (accessed 18/12/2019).
[338] This Convention requires ratification of 30countries to enter into force, but it has only been ratified by 22 countries. See https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en (accessed 18/12/2019).
[339] Convention on the Law of the Non-Navigational Uses of International Watercourses, New York, 21 May 1997, Entry into force: 17 August 2014, after 35 countries have ratified it in accordance with Article 36(1). See https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-12&chapter=27&clang=_en (accessed 18/12/2019).
[340] Jacob Cogan, 'The Changing Form of the International Law Commission's Work', in Robert Virzo and Ivan Ingravallo (eds), *Evolutions in the Law of International Organization,* (Brill Nijhoff 2015) 8. See also Sean Murphy, (n 328) 29. See also Bryan H. Druzin, 'Why does Soft Law have any Power anyway?', (2017) 7 Asian Journal of International Law 361, 361-362.
[341] James Crawford and Simon Olleson, 'The Continuing Debate on a UN Convention on State Responsibility', (2005) 54 International and Comparative Law Quarterly 959.
[342] UNGA. Res 56/83 (28 January 2002).

adopted because of differences between states.[343] In this regard, it was argued that by adopting the outputs of the ILC without turning it into a treaty, the UN could "avoid the protracted negotiations that would have ensued in a diplomatic conference which might result in a reopening of the topic and the repetition or renewal of the discussion of complex issues and could endanger the balance of the text found by the ILC".[344] On this basis, Crawford argued that "an unsuccessful convention may even have a decodifying effect. A more realistic and potentially more effective option would be to rely on international courts and tribunals, on State practice and doctrine. These will have more influence on international law in the form of a declaration or other approved statement than they would if included in an unratified and possibly controversial treaty".[345] In light of the above, it is clear that the establishment of an international treaty that does not gain acceptance and ratification by states could lead to a decrease in the effectiveness of the rules referred to in the treaty.

Technically, it was argued that the use of the non-treaty form could provide a compromise between countries that do not wish to regulate UJ in a treaty form and others that tend to prefer the non-treaty form in codifying UJ. There are also a number of reasons that support the use of a non-treaty or soft law in codifying UJ, which includes the following: firstly, using the non-treaty shape gives it a degree of flexibility and the ability to continue to evolve, leaving room for improvement in line with future requirements. This is due to the fact that the amendment, replacement and supplementing of soft law instruments is easier than it is with treaties.[346] Secondly, the use of non-treaty forms allows legislators to be more progressive and flexible in developing the rules of international law.[347] Finally, in contrast to conventions "soft tools can provide more immediate evidence of international support and consensus than a treaty whose impact is heavily qualified by reservations and the need to wait for ratification and entry into force".[348]

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[343] Abdualbaset Alfaidi, (n 203) 31.
[344] Martti Koskenniemi, 'Solidarity Measures: State Responsibility as a New International Order', (2002) 72 (1) British Yearbook of International Law 337, 341.
[345] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries,* (Cambridge University Press 2002) 58-59.
[346] Santiago Villalpando, 'Codification Light: A New Trend in the Codification of International Law at the United Nations', (2013) 2 Brazilin Yearbook of International law 117, 150.
[347] Jacob Cogan, (n 340) 17.
[348] Alan Boyle, 'Some Reflections on the Relationship of Treaties and Soft law', (1999) 48 (4) International and Comparative Law Quarterly 901, 903.

Accordingly, the form that the ILC uses when addressing the issue of UJ needs to be determined. Firstly, the ILC should work on studying the principle of UJ, devising its definition, the scope, and preconditions for its practice. This process is done through analysing the practice of states and rulings issued by national and international courts related to the exercise of UJ. Regarding the form of the ILC's output, the output of the ILC's work in this regard should be in the form of guidelines or draft articles and should not be in the form of a treaty. This Is because vagueness in the definition and issues connected to the principle of universality has at times led to tensions between states.[349] Thus, it appears that the controversy between countries makes the adoption and entry into force of a convention on UJ unlikely. It might be worth noting that some aspects of UJ are less settled than others and so taken overall a treaty is the less appropriate form.

As Tomuschat argues, “the codification in the form of the soft law instrument may prove as effective as or, even more, effective than the treaty which after its launching receives only a hesitant response from the international community”.[350] As mentioned above, such an approach was used with regard to the draft articles on State Responsibility, which proved successful as it was later used as a convincing source of guidance and adopted by States and referred to by the ICJ.[351] Consequently, it is unlikely that UJ could be codified and produced in the form of a treaty, due to a number of disagreements between countries during the discussion of UJ before the Sixth Committee.[352]

In light of the above analyses, it can be concluded that an instrument on the subject of UJ should not be in the form of a convention. Instead, the ILC could take a more modest approach, avoiding a possibly inconclusive and divisive debate in the Sixth Committee, "by the publication of a report containing a set of draft articles and commentary and a

[349] Charles Chernor Jalloh, (n 188), para 2, at 307.
[350] Christian Tomuschat, ‘The International Law Commission: An Outdated Institution?’, (2006) 49 German Yearbook of International Law 77,105.
[351] UNGA Resolution, 56th session, Doc. No. A/RES/56/83 (28 January 2002). See also Matthew Garrod, *Rethinking the Protective Principle Of Jurisdiction And Its Use In Response To International Terrorism*, (PhD Thesis University of Sussex,2015) 237.
[352] Sixth Committee of the GAUN, informal working paper, (n 187); Charles Chernor Jalloh, (n 188), para 8, at 309-310.

recommendation to the Assembly to take no further action. Alternatively, the ILC could recommend to the Assembly to 'take note' of or 'adopt' the aforesaid report in the form of a resolution or declaration and without taking any further action. ".[353] It is likely, based on past practice, that this would be considered authoritative.

6.5: Summary

The research in this chapter has focused on studying the possibility of codifying UJ by the ILC. In order to do so, the research initially focused on previous attempts to codify UJ, which have appeared since the early 2000s. Indeed, a number of private legal institutions have submitted explanatory reports on UJ. For instance, the International Law Association (ILA) (2000);[354] Institute of International Law (2005),[355] and The Princeton Project on UJ (2001).[356] It is worth noting the importance of these legal writings that sought to codify and clarify UJ, as they are considered a subsidiary source of international law. In this matter, Article 38(1)(d) of the ICJ Statute provides that the 'teachings of the most highly qualified publicists of the various nations' are considered ' as subsidiary means for the determination of the rules of law'.[357]

It was concluded that these previous attempts included an explanation of principles and guidance on UJ. In fact, they seek to give legitimacy and greater coherence to the exercise of UJ. They also aim to encourage greater accountability of perpetrators of serious crimes under international law. Thus, they are an important contribution to defining the scope and concept of UJ. It is arguably a pioneering initiative whose texts could be used in the future as a guide to codify UJ.

However, it should be noted that some texts mentioned in these previous attempts need to be reviewed. For example, the texts relating to the definition of UJ, where it was noted that most of the previous attempts either lacked a definition of UJ or the definition did not effectively clarify the main elements of such jurisdiction and for this reason it was not widely accepted. Furthermore, it was observed that some texts in the previous attempts ignored the

[353] Matthew Garrod, (n 351) 237.
[354] Report of the ILA, (n 13).
[355] Institute of International Law Resolution, (n 14).
[356] The Princeton Principles on Universal Jurisdiction, (n 26).
[357] Statute of the International Court of Justice, (n 27) art 38 paragraph 1 (d).

preconditions for exercising UJ. For instance, the ILA's report on UJ was criticized for not being accurate with regard to immunity. In this matter, the ILA's report suggests that the immunity of current officials should not be considered an impediment to the exercise of UJ.[358] This recommendation was criticised because there is no customary or conventional international rule that allows the exercise of national criminal jurisdiction of the foreign state over holders of diplomatic immunities. In fact, the holders of diplomatic immunities, such as heads of state, prime ministers and foreign ministers, during the performance of their functions enjoy temporary procedural immunity from the exercise of UJ by foreign states.[359]

As a second example, the Princeton Principles do not require the presence of the accused as a condition for the exercise of UJ. In fact, such a point of view contradicts the practice of the States discussed in Chapter 4, which has shown that most countries in the world in recent times require the presence of the accused as a prerequisite for the exercise of UJ.[360] Thus, such points should be taken into account when the ILC will work on codifying UJ.

Moreover, this chapter discussed the ongoing work of the UN in defining the scope and definition of UJ that started since 2009. As mentioned above, from 2009 onward, UJ has been discussed by the Sixth Committee each year, and this should give significant results in terms of clarity on the differences between states' views on this principle.[361] However, wider developments have not happened so quickly as expected, and at the beginning of 2018, the African Union gave an expression of disappointment regarding an "impasse" on UJ within the UNGA, calling for the Assembly's African Group to propose methods for progressing the discussion at the New York summit.[362] Failure to achieve significant movement on this issue to date may be partly based on a lack of political consensus around selectivity and arbitrariness in applying the principle of universality. For example, at the debate of the UNGA on UJ in 2017, while almost all delegates agreed that there was a need to make progress,

[358] Report of the ILA, (n 13), 14.
[359] International Law Commission, (n 46) para 66 at p.33.
[360] Olympia Bekou and Robert Cryer, (n 20) 56.
[361] Report of the Sixth Committee (n 3); UNGA Resolution (n 3). See also United Nations, 72nd Session, (n 4).
[362] African Union, (n 190).

there were differences concerning how to define the concept, its scope, character and limitations, reflecting each debate since 2010.[363]

Therefore, it was argued that this issue should be referred to the ILC. It is worth mentioning that the issue of referring the discussion of UJ to the ILC instead of the Sixth Committee of the UNGA has been raised by a number of countries.[364] However, some countries preferred that the issue be discussed with the Sixth Committee of the UN.[365] In addition, it was suggested that a special working group be established to work on this issue under the Sixth Committee.[366] In the end, discussion of a topic remained with the Sixth Committee of the UN, although the discussion has not reached a conclusion since 2009.[367]

In this matter, the research believes that the ILC is currently able to find a point of convergence on defining the concept and scope of UJ.[368] This is because of the prominent role of the ILC in the progressive development and codification of international law. In this context, "the ILC can draw on its members' specialized knowledge and experience to prepare draft texts that more accurately assess existing state practice and opinio juris. The ILC might also be able to prepare these texts more efficiently than the General Assembly due to its significantly smaller size and the fact that its members serve in their personal capacities rather than as representatives of states".[369]

Additionally, it was argued that If the ILC studies the issue of UJ could led to provide a draft conclusions/guidance which could contribute to the consideration of the topic by the Sixth Committee. In fact, action to develop and codify UJ seems possible currently based on the large body of evidence on state practices doctrine and precedents. It should also be noted that there has been much progress made by the ILC and the Sixth Committee to develop

[363] Charles Chernor Jalloh, (n 188), para 9, at 310.
[364] Peru, UN Doc. A/C.6/64/SR.12(25 November 2009), para 71; Switzerland, ibid, para 24. See also Belarus, UN Doc. A/C.6/65/SR.10 (3 November 2010), para 77; See also Argentina UN Doc. A/C.6/65/SR.11 (14 January 2011) para 28; Vietnam, ibid, para 47; Germany, ibid, para 75; The Republic of Korea, ibid para 15. See also Nigeria, UN Doc. A/C.6/65/SR.12 (10 November 2010) para 41; Lesotho, ibid, para 39. See also Peru, UN Doc. A/C.6/68/SR.13 (6 January 2014), para 45; Guatemala, ibid, para 24.
[365] Tunisia on behalf of the African Group UN Doc. A/C.6/64/SR.12(25 November 2009) para 16; China, ibid, para 51; Russia UN Doc. A/C.6/64/SR.13 (24 November 2009) para 14-17. See also Tanzania, UN Doc. A/C.6/65/SR.11 (14 January 2011), para 45; Ethiopia, ibid, para 70.
[366] Report of the UN Secretary-General, (n 197), para 110. See also South Africa, UN Doc. A/C.6/65/SR.11 (14 January 2011) para 77; Chile on behalf of the Rio Group, UN Doc. A/C.6/65/SR.10 (3 November 2010), para 58.
[367] Martin Mennecke, (n 141) 23, 25 and 30.
[368] Charles Chernor Jalloh, (n 188), at 312.
[369] Laurence Helfer and Timothy Meyer, (n 200) 309.

criminal law through collaborative efforts. Turning attention to UJ would represent a continuation of this work, including but not exclusively related to developing international legal principles set out in the Nuremberg Tribunal's charter, in its 1950 judgement, and in the 1994 draft statute to establish an international criminal court on a permanent basis.[370]

To summarise, if the ILC can identify clear principles to address impunity regarding those aspects of UJ that are less clear and settled, while respecting issues of sovereignty, this could reduce disagreement around UJ. For this to be effective, the principle's parameters in terms of codifying pre-existing international laws must be set out, in addition to developing the principle progressively. Legal study of UJ should lead to commentary and conclusions which will benefit tribunals, courts, international organisations, academics and professionals involved in international law. Based on its distinctive mandate based on statute and its previous and present work within international criminal law, with links to this topic, the ILC is uniquely positioned to contribute in this regard. In terms of the project's eventual outputs, these might comprise draft guidance and conclusions regarding UJ's scope of use and how it should be applied. Various alternative or additional outputs are also possible and could flow from proposals made by states before the Sixth Committee.[371]

In conclusion, it should be noted that despite the form of output the ILC decides to take, the adoption of any instrument on UJ may take a number of years, perhaps even decades. In fact, this delay was observed when the ILC worked on a number of important issues, perhaps the most prominent of which is the topic of State Responsibility, which was identified as "necessary and desirable" for codification by the ILC at its first session. In this matter, the research believes that the work of the ILC on codifying UJ, even if it is late, will be better than never.

[370] Yearbook of the ILC 1950 Volume II, (n 201); Draft Statute for ICC, (n 200).
[371] Charles Chernor Jalloh, (n 188), para 31-32, at 317.

Chapter Seven: Conclusion

7.1: Chapters Summary

This research has analysed how far the concept of universal jurisdiction (UJ) has evolved and explored what should be done to enhance it further in the near future.

Chapter one provided the introduction of this study. The research presented the background of the research. It then analysed the significance of the research. Following that, it discussed the research questions and aims. Then, it addressed the research methodology and outlined the research structure.

Chapter two examined the historical roots of UJ and its emergence under international law. This chapter was divided into two main sections. Firstly, it examined the roots of UJ from the Code of Justinian. Indeed, the purpose of this section is to shed light on how the historical and philosophical background of UJ paved the way for the emergence of this principle under customary international law, as an exceptional form of traditional or classic jurisdiction. The second main section in this chapter focused on the historical development of UJ under international law. The section addressed the legal development of UJ in international law that began since its recognition under international customary law over crimes of piracy.

In Chapter three, several fundamental issues concerning UJ were subject to scrutiny. The chapter examined the definition of UJ and the legal framework for its exercise. The research firstly examined the definition of UJ, as well discussing the specifications of UJ on other traditional forms of Jurisdiction. After that, in order to determine the scope of the principle, the research examined the international crimes over which UJ can be exercised. In this regard, the research started by examining the crime of piracy as a historical basis for 'classic' universal jurisdiction. Then, it discussed the crimes that have recently been recognised to be subject to 'modern' universal jurisdiction. Finally, the research examined the possibility of exercising UJ over the environmental destruction and terrorism.

Chapter four presented a survey of the practice of 72 states in terms of UJ. Based on the survey's observations, the research discussed whether the exercise of UJ over the most

serious crimes exists as a rule of customary international law. Secondly, the research determined the preconditions for UJ which are required in accordance with state practice. Finally, it highlighted the difficulties that have faced states when they practice UJ.

Chapter five discussed the reason behind the monopoly of exercising UJ by the national courts and the absence of any practice by international courts. The research examined the reasons for the failure of international efforts to grant UJ to international tribunals and court. The research discussed the possibility of granting UJ to the current ICC, or any other international court in future. As an alternative to establishing international tribunals with UJ, the research examined the possible regional or international mechanisms that might support national courts in the exercise of UJ. These include the establishment of the Extraordinary African Chambers by Senegal and the African Union as form of regional cooperation to exercise UJ in an efficient and impartial manner.

Chapter six built upon the outcomes of the previous chapters and explored the appropriate way of codifying UJ. The chapter firstly analysed the previous efforts to codify the principle of UJ, such as Princeton's principles on UJ and the work of the UN Sixth Committee on UJ since 2009. The chapter also examined the position of the International law Commission (ILC) on the codification of UJ. The aim of this point was to clarify the position of the ILC on UJ and why it has not been discussed extensively to date. Additionally, it argued that the ILC should contribute to the codification of UJ.

7.2: Main Findings of the Research and Contribution to Knowledge

This research has studied the doctrine of UJ with the aim of discovering where it stands today and what should be done to enhance it further in the near future. This study makes a contribution to the scholarship on UJ. In an attempt to fulfil that, the research has sought to add a contribution to the understanding of UJ in each main chapter of the research.

To demonstrate that, the second chapter discussed the position of Islamic law on UJ. As this topic could be a contribution to previous literature that dealt with philosophical roots similar to UJ in Justinian Civil Code, as well as to previous literature, which argued that the principle

of *actio popularis* in Roman law could be a parallel to the principle of UJ.[1] It is noteworthy that the emergence of the religion of Islam, whose rules and principles are known today as "Islamic law" coincided with that historical period.[2] Moreover, the Roman notion of *actio popularis* was known under Islamic law as *Al-Hisbah*.[3]

Therefore, as a contribution to knowledge, the research discussed the position of Islamic law on UJ. In this matter, the research concluded that the application of the principle of *Al-Hisbah* did not extend to the recognition of the exercise of UJ. However, UJ relates to the principle of "enjoining good and forbidding wrong" and the principle of cooperation in goodness and devoutness, which could form the legal basis for UJ under Islamic law. In fact, the above-mentioned principles are also considered the legal basis of the *Al-Hisbah* itself. Consequently, the exercise of UJ to combat impunity would not contradict the provisions of Islamic law. This is because the international crimes that are subject to UJ are also criminalised by Islamic law.[4] Thus, the exercise of UJ under Islamic law can be considered a manifestation of the enjoining good forbidding wrong and cooperation in goodness and devoutness principles.

As a second contribution, the third chapter discussed the definition and scope of UJ, here it was noted that UJ still lacked a unified definition and scope in previous literature. Therefore, the research suggested that UJ could be defined as follows: UJ is an exclusive criminal jurisdiction that can be exercised over accused of committing a certain number of international crimes by national courts of any state on whose territory the accused is present, especially in the absence of an effective jurisdiction that should otherwise be exercised.

Regarding the international crimes covered by UJ, the research concluded that the international crimes covered by UJ are characterised as a violation of peremptory norms under international law. In addition, there is an international provision that considers UJ to be a means to prosecute the perpetrators of these violations. Based on this standard, the international crimes covered by UJ include the following crimes: piracy, slavery, war crimes,

[1] William J. Aceves, 'Actio Popularis - The Class Action in International Law', (2003) 1 University of Chicago Legal Forum 353, 355-360.
[2] Khaled Abou El Fadl, *Reasoning with God: Reclaiming Shari 'ah in the Modern Age,* (1st edn, Rowman & Littlefield, 2014), xxxii. See also Michael Cook, *Forbidding Wrong in Islam: An introduction*, (1st end, Cambridge University Press 2003) 5-7.
[3] Adnan El Amine, 'Culture of law at Arab universities', (2017) 10 Contemporary Arab Affairs 392, 393.
[4] Farhad Malekian, *The concept of Islamic International Criminal Law: A Comparative Study*, (1st edn, London, Graham and Trotman, 1994), 129.

crimes against humanity, genocide and torture. However, the aforementioned standard does not preclude the development of the scope of crimes covered by UJ to include any international crime that meets the two conditions mentioned above, namely the violation of peremptory norms under international law and the existence of an international provision that supports the consideration of UJ as a means to prosecute the perpetrators.

To develop a definition of UJ and its scope, Chapter 4, conducted a survey of 72 countries to determine their positions on UJ. Based on this survey, the research discussed whether the exercise of UJ over the most serious crimes exists as rule of customary international law. Additionally, the research determined the preconditions for UJ, which are required in accordance with the state practice. It was suggested that the authorising of UJ by the national legislation of 46 states could be regarded as form of state practice.[5] Indeed, the figure of 46 states suggests that practice is general and not limited to a few states from a specific region, but rather it is widely accepted by a significant number of states across different continents.

In this matter, it was observed that although some countries have extended the scope of UJ to include some ordinary crimes, most countries share the view that the scope of UJ includes only the following crimes: piracy, slavery, war crimes, genocide, crimes against humanity and torture.[6] Additionally, most countries have authorised their national courts to exercise criminal jurisdiction over the above-mentioned crimes on condition that the accused are present in the territory of the state.[7] In light of the this common perception, it was concluded that the enactment of national legislation authorising UJ can be considered a form of state practice in support of UJ. Also, it was concluded that that the second element of customary international law, acceptance as law, exists in the context of UJ. This is due to the fact that UJ has been adopted by national legislations in a significant number of states, which has proved

[5] Report of the International Law Commission on the Work of its 70th Session' (30 April–1 June and 2 July–10 August 2018) UN. Doc. No. A/73/10, p 132.

[6] Mahmoud Cherif Bassiouni, 'Universal jurisdiction for international crimes: historical perspectives and contemporary practice', (2001) 42 Virginia Journal of International Law 81, 107. See also The Princeton Principles on Universal Jurisdiction, (2001) 28 Princeton University Program in Law and Public Affairs. [hereinafter, The Princeton Principles on Universal Jurisdiction]. See also Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990 (Unofficial translation by Human Rights Watch) September 2, 2013, art 3 available at https://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers [accessed 1 April 2019].

[7] Ben-Ari, Rephael, 'Universal jurisdiction: chronicle of a death foretold?', (2015) 43 Denver Journal of International Law and Policy 165, 170.

the existence of *opinio juris* in the context of UJ. Additionally, diplomatic representatives have stressed that UJ is a legal principle permitted by international law to fill the gap of impunity.

On the other hand, the research observed that UJ is not absolute over international crimes.[8] Rather, there are a number of conditions that must be met to exercise UJ. These include the presence of the accused in the territory of the state that will exercise UJ.[9] This is because there is no legal basis that supports the legality of UJ in absentia.[10] As mentioned above, it was argued that the exercise of UJ in absentia is unknown in international law.[11] Therefore, neglecting the need for the presence of the accused in the territory of the state as a condition for UJ will make it a jurisdiction that can be selectively misused.

Secondly, the exercise of UJ should not violate the immunity of current officials due to the fact that there is no legal rule under customary or conventional international law that permits national courts of foreign states to exercise criminal jurisdiction over the holders of diplomatic immunity. It is worth mentioning that diplomatic immunity only temporarily precludes the exercise of criminal jurisdiction in all its forms by foreign national courts.[12] Once the accused is discharged from office as the representative of a State, there is no diplomatic immunity that may prevent the exercise of criminal jurisdiction.[13] Additionally, immunity is not granted to a person *per se* but to his or her status as representative of the State when carrying out the duties entrusted to them.[14] Thus, UJ cannot be exercised over persons who have diplomatic immunity unless their state waives the right of immunity. Thirdly, the exercising of UJ should be conditional on its being used as last resort, with priority to employ criminal

[8] Report of the UN Secretary-General, The scope and application of the principle of universal jurisdiction, Sixty-ninth session, UN. Doc. No. A/69/174 (23 July 2014). It was argued that there are obvious tendencies among states in favour of the restrictive or conditional exercise of universal jurisdiction.

[9] Ben-Ari, Rephael, (n 7) 170.

[10] Fannie Lafontaine, 'Universal Jurisdiction the Realistic Utopia', (2012) 10 Journal of International Criminal Justice 1277, 1283.

[11] Separate Opinion of President Guillaume to the Judgment of 14 February 2002, available at http://www.icj-cij.org/files/case-related/121/121-20020214-JUD-01-01-EN.pdf. the Separate Opinion in case of the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v.Belgium), Judgment,Feb. 14, 2002) , available at http://www.icj-cij.org/docket/files/121/8126.pdf [hereinafter Arrest Warrant Case].

[12] Jana Panakova, 'Law and politics of universal jurisdiction', (2011) 3 Amsterdam law forum 49, 57.

[13] Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), International Court of Justice (ICJ), 14 February 2002, (paras. 61) p 22.

[14] Summaries of Judgments, Advisory Opinions and Orders of The International Court of Justice (1997-2002), Publications ST/LEG/SER.F/1/Add.2, UN, 2003, Merits of the case (paras. 45-71), p. 212.

jurisdiction granted to the State where the crimes were committed.[15] In this matter, it is argued that the exercise of UJ will be more pragmatic and homogeneous by giving priority to criminal jurisdiction based on traditional grounds, such as territorial jurisdiction and national jurisdiction.[16] In recent years, subsidiarity has been supported as a modality or guiding principle in the exercise of UJ. Indeed, the subsidiarity as a guiding principle aims to bring balance between principles of UJ and state sovereignty.[17] Consequently, the territorial state can maintain its sovereignty and prevent the use of UJ through the exercising of its criminal jurisdiction.[18]

As another contribution, the research discussed what should be done to enhance UJ further in the near future. Chapter five examined the possibility of exercising UJ by international courts and found that there is no legal condition that requires that UJ should be exercised by national courts only. However, the international practice has shown **no** practice of UJ by an international court.[19] Indeed, by tracking the international efforts to establish an international criminal court, which lasted about 80 years, it was noticed that UJ has not been exercised by any international tribunal or court.[20] In fact, all proposals to grant any international court or tribunals UJ have failed.

Accordingly, it was concluded that the view that UJ can be exercised through an international court is incorrect because no international tribunal or court has exercised UJ. Secondly, it was concluded there are legal and political obstacles that prevent the creation of a new international court with UJ through international treaty.[21] These obstacles are the same obstacles encountered by the German and South Korean proposals for granting the ICC UJ,

[15] Jo Stigen, 'The Relationship between the Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes', in Morten Bergsmo (ed), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes*, (Oslo: Torkel Opsahl Academic EPublisher, 2010) 141.
[16] Petra Baumruk, *The Still evolving Principle of Universal Jurisdiction*, (PhD Thesis Charles University in Prague, 2015) 122.
[17] Mari Takeuchi, *Modalities of the Exercise of Universal Jurisdiction in International Law*, (PhD Thesis University of Glasgow 2014) 128.
[18] Jo Stigen, (n 15) 153-157.
[19] Gabriel Bottini, 'Universal jurisdiction after the creation of the International Criminal Court', (2004) 36 New York University Journal of International Law and Politics 503, 513.
[20] Ibid.
[21] Máximo Langer, 'The diplomacy of universal jurisdiction: the political branches and the transnational prosecution of international crimes', (2011) 105 The American Journal of International Law 1, 10.

including the conflict with Article 34 of the VCTL and the opposition of states.[22] Accordingly, the impression of creating a new international criminal court or to give UJ to the ICC is unhelpful, and any attempt to do so is unlikely to succeed.

As an alternative to the exercise of UJ by international courts, the research suggests that the international efforts should focus on supporting states' exercise of UJ through the hybrid court system. Following the example of the establishment of the Extraordinary African Chambers by Senegal and the African Union as regional cooperation to exercise UJ in an efficient and impartial manner. In this matter, it was concluded that the establishment of the hybrid courts to support the states' exercise for UJ theoretically could be possible[23] because the hybrid court is not a new court, rather it is a national court with international support, which can exercise UJ when the accused is present in its territory.[24]

The research in Chapter six examined the possibility of codifying UJ. As contribution to knowledge, the research reviewed and analysed the previous efforts to codify the principle of UJ, such as the work of International Law Association (ILA) (2000),[25] the Institute of International Law (2005),[26] the Princeton Project on UJ (2001),[27] and the work of the UN Sixth Committee on UJ since 2009.[28] These previous attempts included an explanation of principles and guidance on UJ. They seek to give legitimacy and greater coherence to the exercise of UJ and aim to encourage greater accountability of perpetrators of serious crimes under international law. Thus, they are an important contribution to defining the scope and concept of UJ. It is a pioneering initiative whose texts could be used in the future as a guide to codify UJ. However, it was noted that most of the previous efforts could not provide a fundamental

[22] Olympia Bekou and Robert Cryer, 'The International Criminal Court and Universal Jurisdiction: A Close Encounter?', (2007) 56 International and Comparative Law Quarterly 49, 54.
[23] Sarah Williams, 'The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem?', (2013) 11 Journal of International Criminal Justice 1139, 1155.
[24] Statute of the Extraordinary African Chambers, (n 6), art 2. See also Sofie A. E. Høgestøl, 'The Habré Judgment at the Extraordinary African Chambers: A Singular Victory in the Fight Against Impunity', (2016) 34 Nordic Journal of Human Rights 147, 151-152.
[25] International Law Association, Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences, prepared by the Committee on International Human Rights Law and Practice, submitted to (London Conference, 2000).
[26] Institute of International Law, Resolution on Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes, Krakow Session – 2005. [hereinafter Institute of International Law Resolution].
[27] The Princeton Principles on Universal Jurisdiction, (n 6).
[28] Report of the sixth Committee, 67th session on ''the scope and application of the principle of universal jurisdiction'', UN. Doc. No. A/67/472 (20 November 2012).

solution in determining the concept of UJ and its scope[29] due to the fact that they merely give guidance and have not grown to have practical influence on the development of UJ, even though they have provided some guidelines for judges to invoke UJ.[30]

Regarding the work of the UN Sixth Committee on UJ, it was observed that the UN still has not come to an overall conclusion on the definition and concept of UJ, although this issue has been debated since 2009.[31] In this regard, the research remarked that the reason for the UN's delay in reaching a conclusion on the subject of UJ is due to the following reasons: firstly, the way in which the UN discussed UJ was very broad and opened up controversial issues.[32] However, it would be improved if the UN focused on three main issues: defining UJ and determining conditions for its exercise, as well as crimes over which jurisdiction could be exercised.[33] Secondly, the composition and mechanism of the General Assembly may not help to reach a conclusion on UJ because it consists of representatives of state parties and decisions of the Assembly are passed by majority.[34] In such an environment, it is difficult to reach an agreement on a controversial legal subject, such as UJ.

This issue should, therefore, be referred to the ILC because of the prominent role of the ILC in the progressive development and codification of international law. As Helfer and Meyer note:

> The ILC can draw on its members' specialized knowledge and experience to prepare draft texts that more accurately assess existing state practice and opinio juris. The ILC might also be able to prepare these texts more efficiently than the General Assembly due to its significantly smaller size and the fact that its members serve in their personal capacities rather than as representatives of states.[35]

[29] Petra Baumruk, (n 16) 62.
[30] Ibid, 62.
[31] Report of the Sixth Committee, 64th session on "the scope and application of the principle of universal jurisdiction", UN. Doc. No. A/62/425 (16 December 2009); UNGA Resolution, 64th Session, Agenda 84, Resolution adopted by the General Assembly on 16 December 2009 [on the report of the Sixth Committee (A/64/452)], No. A/RES/64/117, (15 January 2010).
[32] Charles Chernor Jalloh, Universal criminal jurisdiction, in Report of the International Law Commission on the Work of its 70th Session' [Annexes. A] (2018) UN Doc A/73/10, para 8, at 309-310. See also para 26, at 316.
[33] Ibid, para 26, at 316.
[34] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, art 9 (1), art 18.
[35] Laurence Helfer and Timothy Meyer, 'The Evolution of Codification: A Principal-Agent Theory of the International Law Commission's Influence', in Curtis Bradley (ed), *Custom's Future: International Law in a Changing World,* (Cambridge University Press 2015) 309.

Indeed, the research supports this suggestion by providing a proposal that summarises the concept and scope of UJ as contribution to knowledge. In this matter, the research aims to put this proposal in the hands of the International law commission in order to help them draft articles on UJ.

7.3: Recommendations

As noted above, this thesis aimed to discover where the doctrine of UJ stands today and what could be done to enhance it further in the near future. Thus, the research has sought to discuss the most important points related to where this doctrine stands today. This includes, the definition of UJ, the scope of this jurisdiction and the preconditions for UJ that are required in accordance with states' practice. However, this thesis cannot and has not intended to provide a description of every matter connected with UJ, and the intention is not to provide comprehensive coverage of this topic. Instead, it is intended to focus on discussions currently developing in relation to UJ and on the core of the principle. Accordingly, the thesis recommends that academic research in studying the concept and scope of UJ should continue until the international community agrees on a unified vision for UJ.

As remarked in the conclusion of the previous chapter, the exercising of UJ lacks uniform regulations under international law due to the fact that UJ derives its international legitimacy from customary international law.[36] However, the exercise of UJ under customary international law is sometimes not clear and precise. The principle of UJ has been recognised implicitly in many international conventions, however, none of these conventions governs the principle of UJ comprehensively.[37] Accordingly, there remains some ambiguity surrounding the exercise of UJ, which prompted the research to suggest that there is an urgent need to codify UJ in order to enhance its exercise in the near future.

In this matter, this topic has evolved enough to be ready for codification. As previously outlined, UJ has been debated by the Sixth Committee since 2009, but progression on this topic has been slight, with the committee concluding only that responsibility and 'judicious application' of UJ, in line with international law, is the most effective means of maintaining the principle as a credible and legitimate

[36] Robert Cryer, *An Introduction to International Criminal Law and Procedure*, (2nd ed, Cambridge University Press, 2010) 54.
[37] Report of the Sixth Committee, (n 31); UNGA Resolution, (n 31). See also, Petra Baumruk, (n 16), 63; Sienho Yee, 'Universal Jurisdiction: Concept, Logic, and Reality', (2011) 10 Chinese Journal of International Law 503, 504.

power.[38] By contrast, this study concludes by suggesting the work of the ILC as a way of providing an effective codification mechanism for UJ. The time is ripe for the ILC to work on codifying UJ because of the prominent role of the ILC play in the progressive development and codification of international law.

It is worth mentioning that the research assessed the position of states on UJ and provided a proposal that summarises the concept and scope of UJ. In fact, the research aims to put this proposal in the hands of the ILC in order to help them draft articles on UJ. Additionally, the research recommended that if the ILC undertook a legal study of UJ, the study's scope can take into account the previous discussion of states within the Sixth Committee, which highlighted a wide range of disagreement.[39] Based on this it may not be beneficial to target a comprehensive approach which seeks to address each issue of concern, but instead focus upon a defined list of legal issues and develop guidelines for these issues based on close working with the Sixth Committee.[40] The following are the most important points that should be considered by the ILC when working on codifying UJ. Firstly, determine a clear definition of UJ and the basic elements of this jurisdiction. Secondly, determine the scope of the exercise of UJ and the relationship of such jurisdiction with traditional jurisdictions, including the issue of a duty or obligation to prosecute. Thirdly, determine the relationship between UJ and other international mechanisms to combat impunity, and the possibility of using these links to support the exercise of UJ.

Regarding what should be done to enhance UJ further in the near future, because of the practical and legal difficulties mentioned in chapter five regarding the establishment of an international court with UJ, the research recommends that the focus should be on supporting states to exercise UJ. To that end, international efforts should focus on supporting states to exercise UJ through the hybrid court system. In this matter, it was concluded that the establishment of hybrid courts to support states' exercise of UJ is theoretically possible[41] because the hybrid court is not a

[38] Charles Chernor Jalloh, (n 32), at 314.
[39] Sixth Committee of UNGA, Informal Working Paper prepared by the Chairperson for discussion in the Working Group - The scope and application of the principle of universal jurisdiction [87], is for the purpose of facilitating further discussion in the light of previous exchanges of views within the Working Group, pp. 1-7 (4 November 2016) It merges various informal papers developed in the course of the work of the Working Group between (2011 - 2014). available at http://papersmart.unmeetings.org/media2/19409767/wg-universal-jurisdiction-informal-working-paper.pdf (Accessed, 5/12/2019).
[40] Charles Chernor Jalloh, (n 32), para 26, at 316.
[41] Sarah Williams, (n 23), 1139–1160.

creation of a new court, but international support for the national court of a state, which can exercise UJ when the accused of committing international crimes is present in its territory.[42]

However, in practice there are two requirements that should be available, including the desire of the state's custody to exercise UJ through the hybrid court.[43] In addition, there is need for the approval of an international or regional institution that will support the national court in the exercise of UJ.[44] In this matter, the research finds that there is no unified model for the establishment of the hybrid courts. As mentioned in chapter five, state practices have shown different models for the establishment of the hybrid courts.[45] On the other hand, the establishment of hybrid courts is not a monopoly of the United Nations, but other international or regional bodies can also contribute to establishing hybrid courts.[46] Thus, states can choose the appropriate methods of establishing a hybrid court to exercise UJ.[47]

Based on this, it is recommended that urging the state that has custody of the accused of committing the international crimes, as appropriate, to seek international cooperation from an international or regional institution to support the exercise of UJ through the hybrid courts system.

7.4: Research's Proposal on UJ

1 Universal jurisdiction is an exclusive criminal jurisdiction that can be exercised over those accused of committing a certain number of international crimes by national courts of any state on whose territory the accused is present, especially in the absence of an effective alternative jurisdiction.

2 International Crimes covered by universal jurisdiction.

(a). International crimes covered by universal jurisdiction are characterised as a violation of peremptory norms under international law. In addition, there is an international

[42] Statute of the Extraordinary African Chambers, (n 6), art 2. See also Sofie A. E. Høgestøl, (n 24) 151-152.
[43] Report of the UN Secretary-General, (n 8). See also Ben-Ari, Rephael, (n 7) 170.
[44] Sarah M.H. Nouwen, 'Hybrid courts' The hybrid category of a new type of international crimes courts', (2006) 2 Utrecht Law Review 190, 210-211.
[45] Ibid, 209.
[46] Ibid, 210-211.
[47] Sofie A. E. Høgestøl, (n 24) 151-152.

provision that considers universal jurisdiction to be a means to prosecute the perpetrators of these violations.

(b). International crimes covered by universal jurisdiction include the following: piracy, slavery, war crimes, crimes against humanity, genocide and torture.

(c). The aforementioned text does not preclude the development of the scope of crimes covered by universal jurisdiction to include any international crime that meets the two conditions mentioned above, namely the violation of a peremptory norms under international law and the existence of an international provision that supports the consideration of universal jurisdiction as a means to prosecute the perpetrators of that violation.

3 Universal jurisdiction and its relationship to the principle of *aut dedere aut judicare*.

(a). The procedural rules resulting from the principle of *aut dedere aut judicare* mentioned under international conventions are not always UJ, unless the provisions of these conventions are deemed to be a peremptory norm under customary international law, in which case its provisions will be applied to the entire international community.

(b). To that end, the principle of *aut dedere aut judicare* supports the exercise of universal jurisdiction as a legal basis for criminal jurisdiction when the crime amounts to a *jus cogens* violation, as there is an international customary rule that considers universal jurisdiction as a means to prosecute the perpetrators of these violations.

4 The exercise of universal jurisdiction is conditional on the presence of the accused on the territory that will exercise such jurisdiction.

5 The holders of diplomatic immunity, such as heads of state, prime ministers and foreign ministers, during the performance of their functions enjoy temporary procedural immunity from exercising universal jurisdiction. Thus, the exercise of UJ should not violate the immunity of current officials.

(a) Diplomatic immunity must not be regarded as a means of impunity, so universal jurisdiction can be exercised over the former officials.

(b). Diplomatic immunity is not granted to a person per se but to his or her status as a representative of the State to carry out the duties entrusted to them. Thus, the State can waive its right to diplomatic immunity for its representatives. In such a case, universal jurisdiction can be exercised by foreign countries.

(c). The immunity from foreign criminal jurisdiction should not be considered an obstacle to any criminal procedures pursued by a foreign State due to the fact that the temporary prohibition from exercising universal jurisdiction over holders of diplomatic immunity does not prevent states that receive complaints about the commission of the international crimes from investigating such allegations. Accordingly, the state can investigate and collect information and evidence on the validity of these allegations.

6 The exercise of universal jurisdiction should be subsidiary to the criminal jurisdiction of other states.

(a). Universal jurisdiction should be exercised only if the state in which the crimes are committed or the state in which the accused are national is unwilling or unable to prosecute.

(b). In the event of a dispute over jurisdiction, the priority is given to criminal jurisdiction based on traditional grounds involving territorial jurisdiction and national jurisdiction, when they are able to be exercised.

(c). Universal jurisdiction cannot be exercised over criminal acts whose perpetrators have been tried for the same act before national or international courts.

7. States should adopt sufficient legislation to criminalise and punish the most serious international crimes mentioned in Article 2. Additionally, States should adopt the necessary legislation to permit the exercise of universal jurisdiction over such crimes.

8. The international standards of a fair trial and human rights should be respected when prosecuting defendants based on the exercise of universal jurisdiction.

9. Exercising universal jurisdiction requires the necessity of cooperation between states in investigating, detecting, gathering evidence, arresting and bringing to trial accused of having committed most serious international crimes, and take adequate measures for such purpose.

10. Urging the state that has custody of the accused, as appropriate, to seek international cooperation from an international or regional institution to support the exercise of universal jurisdiction through the hybrid court system.

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